150 US 231

150-231

# RECORD, CASE No. 13,915.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM NO., ~~284~~ 53

J. LESLIE THOMPSON, AS RECEIVER OF THE FIRST NATIONAL BANK OF SIOUX FALLS, DAKOTA, AND THE FIRST NATIONAL BANK OF SIOUX FALLS, DAKOTA, PLAINTIFFS IN ERROR,

*vs.*

THE SIOUX FALLS NATIONAL BANK OF SIOUX FALLS, DAKOTA.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF DAKOTA.

FILED NOVEMBER 9, 1889.

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IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF DAKOTA.

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a OFFICE COMPTROLLER OF CURRENCY, *Aug.* 22, 1889.

You are hereby authorized and directed to sue out and prosecute in your own name and for the First National Bank of Sioux Falls, Dakota, a writ of error to the Supreme Court of the United States from the judgment and decision of the supreme court of the Territory of Dakota, rendered at the October, 1888, term of said court in favor of the Sioux Falls National Bank of Sioux Falls, Dakota, against you and the said First National bank, affirming the judgment of the district court of the county of Moody and Territory of Dakota.

Dated Washington, D. C., August 26, 1889.

E. S. LACEY,
*Comptroller of the Currency of the United States.*

To J. Leslie Thompson, receiver First National bank, Sioux Falls, Dakota.

[Endorsed:] Supreme court of the Territory of Dakota. Filed Sep. 2, 1889. J. H. C. Young, clerk.

b UNITED STATES OF AMERICA, *ss*:

The President of the United States to the honorable the chief justice and associate justices of the supreme court of the Territory of Dakota, Greeting:

Because in the record and proceedings, as also in the rendition of judgment of a plea which is in the said supreme court, before you or some of you, between J. Leslie Thompson, as receiver of the First National Bank of Sioux Falls, Dakota, and The First National Bank of Sioux Falls, Dakota, plaintiffs in error, and The Sioux Falls National Bank of Sioux Falls, Dakota, defendant in error, a manifest error hath happened, to the great damage of the said J. Leslie Thompson as receiver, &c., and the said First National Bank of Sioux Falls, Dakota, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

said Supreme Court, the 12th day of December, in the year of our Lord one thousand eight hundred and eighty-eight.

Seal of the Supreme Court of Dakota Territory.

J. H. C. YOUNG,
*Clerk of the Supreme Court of the Territory of Dakota.*

Allowed by—
BARTLETT TRIPP,
*Chief Justice of the Supreme Court of the Territory of Dakota.*

[Endorsed:] Supreme court of the Territory of Dakota. Filed Dec. 16, 1888. J. H. C. Young, clerk.

c THE UNITED STATES OF AMERICA:

To the Sioux Falls National Bank of Sioux Falls, Dakota, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of Dakota, wherein J. Leslie Thompson, as receiver of the First National Bank of Sioux Falls, Dakota, and The First National Bank of Sioux Falls, Dakota, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Bartlett Tripp, chief justice of the supreme court of the Territory of Dakota, this 12th day of December, in the year of our Lord one thousand eight hundred and eighty-eight.

BARTLETT TRIPP,
*Chief Justice of the Supreme Court of the Territory of Dakota.*

d [Endorsed:] Personal service is hereby admitted of the within this 19th day — December, A. D. 1888, by receiving copy of the within at Sioux Falls, Dakota Territory. H. H. Keith, att'y for the Sioux Falls National bank. File when received. Supreme court of the Territory of Dakota. Filed Dec. 23, 1888. J. H. C. Young, clerk.

TERRITORY OF DAKOTA, } ss:
*County of Minnehaha,* }

On this 19th day of December, in the year of our Lord one thousand eight hundred and eighty-eight, personally appeared T. B. McMartin before me, the subscriber, a notary public in and for said county and Territory, and makes oath that he delivered a true copy of the within citation to H. H. Keith, who is attorney for plaintiff and appellee, The Sioux Falls National Bank of Sioux Falls, Dakota, by delivering to and leaving with said H. H. Keith a true and correct copy of the within citation.

T. B. McMARTIN.

Sworn to and subscribed the 19th day of December, A. D. 1888.

[Seal E. W. Harvey, Notary Public, Dakota.]

E. W. HARVEY,
*Notary Public, D. T.*

1 TERRITORY OF DAKOTA, }
*County of Minnehaha, and upon Change of Venue Taken to County of Moody,* } *ss:*

District Court, Fourth Judicial District.

THE SIOUX FALLS NATIONAL BANK, Pl'ff and Respondent,
*vs.*
THE FIRST NATIONAL BANK OF SIOUX FALLS, DAK., and J. LESLIE THOMPSON, Receiver, etc.

To H. H. Keith, Esq., attorney for the above-named plaintiff & respondent, and to W. D. Stete, clerk of said district court, and A. J. George, clerk of district court of Moody county, Dak.:

Please take notice that the above-named defendant, First National Bank of Sioux Falls, Dakota, appeals to the supreme court of the Territory of Dakota from the order of the said district court of Minnehaha county, entered therein on the ninth day of March, A. D. 1886, denying the motion of said defendant, The First National Bank, to dissolve the attachment issued therein on the first day of March, 1886, against the property of said defendant, The First National Bank of Sioux Falls, and from the whole thereof.

Dated this 23d day of August, A. D. 1888.

WILKES & WELLS & BOYCE & BOYCE,
*Attorneys for Defendant First Nat. Bank.*

(Endorsed:) District court, Territory of Dakota. The Sioux Falls National Bank, pl'ff, *vs.* The First National Bank of Sioux Falls, def't. Notice of appeal to supreme court. Wilkes & Wells & Boyce & Boyce, attorneys for appellant, First National Bank. Personal service admitted by copy this 27th day of August, 1888. H. H. Keith, att'y for plaintiff & respondent. Personal service admitted by copy this 28 day of Aug., 1888. W. D. Stites, clerk. Per-
2 sonal service admitted by copy this 29th day of Aug., 1888. Alex. J. George, clerk. Filed at 3 o'clock p. m., on Aug. 29th, 1888. Alex. J. George, clerk of the district court, Moody county, Dakota. Supreme court of the Territory of Dakota. Filed Sep. 27, 1888. J. H. C. Young, clerk.

3 TERRITORY OF DAKOTA, *County of Moody, and upon Change of Venue Taken from County of Minnehaha,* } ss:

District Court, 4th Judicial District.

THE SIOUX FALLS NATIONAL BANK, Plaintiff and Respondent,
*vs.*
THE FIRST NATIONAL BANK OF SIOUX FALLS and J. LESLIE THOMPSON, Receiver of the First National Bank of Sioux Falls, Defendants and Respondents.

To H. H. Keith, Esq., attorney for the above named plaintiff, and to A. J. George, clerk of said district court:

Please take notice that the above-named defendant, The First National Bank of Sioux Falls, appeals to the supreme court of the Territory of Dakota from the judgement of the said district court entered herein on the 29th day of June, A. D. 1887, and from the whole thereof, and on such appeal will ask said supreme court to review the order of the district court of March 9th, 1886, denying the motion of the said defendant, The First National Bank, to dissolve the attachment issued therein on the 1st day of March, 1886, the order of June 23rd, 1887, directing a verdict in said action, and the order overruling the motion of said defendant for a new trial of said action and from the whole thereof.

Dated this 27th day of August, A. D. 1888.

WILKES & WELLS AND BOYCE & BOYCE,
*Attorneys for said Defendant, The First National Bank of Sioux Falls.*

(Endorsed:) District court, Territory of Dakota. Notice of appeal to supreme court. Personal service admitted by copy the 27 day of August, 1888. H. H. Keith, att'y for plaintiff & respondent. Personal service admitted by copy this 29th day of August, 1888. Alex. J. George, clerk. Filed at 3 o'clock p. m. on 29th Aug., 1888. Alex. J. George, clerk of the district court, Moody county, Dakota. Supreme court of the Territory of Dakota. Filed Sep. 27, 1888. J. H. C. Young, clerk.

4 TERRITORY OF DAKOTA, } ss:
*County of Moody,* }

In District Court, Fourth Judicial District.

THE SIOUX FALLS NATIONAL BANK, Plaintiff and Respondent,
*vs.*
THE FIRST NATIONAL BANK OF SIOUX Falls, Dakota, Defendant, and J. Leslie Thompson, as Receiver of the First National Bank of Sioux Falls, Dakota, Defendant and Appellant. } Notice of Appeal from Judgment.

Please take notice:

That the defendant J. Leslie Thompson, as receiver of the First National Bank of Sioux Falls, Dakota, in the above-entitled action, appeals from a judgment entered therein on the 29th day of June, A. D. 1887, in favor of the plaintiff against the defendant for eighteen thousand four hundred seventeen and $\frac{24}{100}$ dollars, and from the whole thereof, to the supreme court of the Territory, and specifies for review the order making this defendant an additional party defendant instead of substituting him as sole defendant; also the order overruling defendant's motion for a new trial.

Yours, &c., T. B. McMARTIN,
*Attorney for Defendant, J. Leslie Thompson, as Receiver, &c.*

Dated Sioux Falls, D. T., July 17th, 1888.

To H. H. Keith, Esq., attorney for plaintiff, and James Wilson, Esq., clerk of the district court of Moody county, Dakota.

Filed at 3 o'clock p. m. on the 21st day of July, 1888.
ALEX. J. GEORGE,
*Clerk of the District Court, Moody County, Dakota.*

(Endorsed:) Filed this 21st day of July, 1888. Alex. J. George, clerk of dist. court. District court, Territory of Dakota, county of Moody. The Sioux Falls Nat. Bank, plaintiff and respondent,
5 *vs.* First Nat. Bank — Sioux Falls, d'f't, and J. Leslie Thompson, as receiver of the First Nat. Bank of Sioux Falls, defendant and appellant. Notice of appeal from judgment. Due service of the within notice of appeal admitted this 20th day of July, 1888, at Sioux Falls, Dakota. H. H. Keith, attorney for respondent. T. B. McMartin, attorney for appellant, Sioux Falls, Dak. Due service of the within notice of appeal admitted at my office, in Flandreau, Moody county, Dakota, this 21st day of July, A. D. 1888. Alex. J. George, clerk district court. Supreme court of the Territory of Dakota. Filed Sep. 27, 1888. J. H. C. Young, clerk.

6 TERRITORY OF DAKOTA, } ss:
*County of Moody,* }

In District Court, Fourth Judicial District.

THE SIOUX FALLS NATIONAL BANK, Plaintiff and Respondent,
*vs.*
THE FIRST NATIONAL BANK OF SIOUX FALLS, DAKOTA, and J. Leslie Thompson, as Receiver of the First National Bank of Sioux Falls, Dakota, Defendants, and J. Leslie Thompson, as Receiver, &c., Defendant and Appellant.

Whereas on the 29th day of June, 1887, in the district court within and for the county of Moody, the above-named respondent recovered a judgment against the above-named appellant for eighteen thousand four hundred seventeen dollars and twenty-four cents;

And the above-named appellant, J. Leslie Thompson, as receiver, &c., feeling aggrieved hereby, intend- to appeal therefrom to the supreme court of the Territory of Dakota:

Now, therefore, we do hereby undertake that the said appellant will pay all costs and damages which may be awarded against him on said appeal or on a dismissal thereof not exceeding two hundred and fifty dollars.

Dated this 17th day of July, 1888.

W. G. McKENNAN.
C. C. CARPENTER.

TERRITORY OF DAKOTA, } ss:
*Minnehaha County,* }

On this 17th day of July, A. D. 1888, before me, the subscriber, appeared W. G. McKennan and C. C. Carpenter, to me personally known to be the same persons described in and who executed the above undertaking, and severally acknowledged that
7 they executed the same.

[SEAL.] In witness whereof I have hereunto set my hand and official seal the day and year above written.

C. F. IRVINE,
*Notary Public, Dakota.*

TERRITORY OF DAKOTA, } ss:
*County of Minnehaha,* }

W. G. McKennan and C. C. Carpenter, being severally sworn, each for himself says: The said W. G. McKennan says he is a resident and freeholder of Sioux Falls, of the county of Minnehaha, in this Territory, and that he is worth the sum of $250.00 over and above all his debts and liabilities and exclusive of all property exempt from levy and sale on execution; and the said C. C. Carpenter for himself says that he is a resident and freeholder of Sioux Falls, of the county of Minnehaha, in this Territory, and that he is worth the

sum of $250.00 over and above all his debts and liabilities and exclusive of all property exempt from levy and sale on execution.

W. G. McKENNAN.
C. C. CARPENTER.

Subscribed and sworn to before me this 17 day of July, 1888.

C. F. IRVINE,
[SEAL.] *Notary Public, Dakota.*

I certify that I find the sureties in the foregoing undertaking sufficient, and do approve and allow the same.

[SEAL.] ALEX. J. GEORGE,
*Clerk of District Court.*

(Endorsed:) Territory of Dakota, Moody county. In district court. The Sioux Falls National Bank, plaintiff and respondent, *vs.* The First National Bank of Sioux Falls, Dakota, defendant, and J. Leslie Thompson, as receiver of the First National Bank of Sioux Falls, Dakota, defendant and appellant. Undertaking on appeal to supreme court. Due service of the within undertaking and
8 notice of residence of sureties admitted this 20th day of July, A. D. 1888. H. H. Keith, att'y for respondent. Filed this 19th day of July, A. D. 1888. Alex. J. George, clerk of court. Supreme court of the Territory of Dakota. Filed Sep. 27, 1888. J. H. C. Young, clerk.

9 TERRITORY OF DAKOTA, } *ss:*
*Fourth Judicial District,* }

In the District Court within and for Moody County.

THE SIOUX FALLS NATIONAL BANK, Plaintiff and Respondent,
*vs.*
THE FIRST NATIONAL BANK OF SIOUX FALLS and J. LESLIE THOMPSON, as Receiver of the First National Bank of Sioux Falls, Defendants and Appellants.

Whereas, on the 29th day of June, 1888, in the district court within and for the county of Moody, the above-named respondent recovered a judgment against the above-named appellants for eighteen thousand two hundred forty-seven and $\frac{14}{100}$ dollars;

And the above-named appellant, The First National Bank of Sioux Falls, feeling aggrieved, hereby intends to appeal therefrom to the supreme court of the Territory of Dakota:

Now, therefore, we do hereby undertake that the said appellant, The First National Bank of Sioux Falls, will pay all costs and damages which may be awarded against it on said appeal or on a dismissal thereof, not exceeding two hundred and fifty dollars.

Dated August 23rd, 1888.

R. J. WELLS.
W. R. KINGSBURY.
H. L. HOLLISTER.

TERRITORY OF DAKOTA, } ss:
*Minnehaha County,* }

On this 23 day of August, A. D. 1888, before me, the subscriber, appeared R. J. Wells, W. R. Kingsbury, & H. L. Hollister, to me personally known to be the same persons described in and who executed the above undertaking, and severally acknowledged that they executed the same.

In witness whereof I have hereunto set my hand and official seal the day and year above written.

[SEAL.] E. S. McDONALD,
*Notary Public.*

TERRITORY OF DAKOTA, } ss:
*County of Minnehaha,* }

R. J. Wells, W. R. Kingsbury, & H. L. Hollister, being severally sworn, each for himself says: The said R. J. Wells & W. R. Kingsbury each for himself says he is a resident and freeholder of the county of Minnehaha, in this Territory, and that he is worth the sum of $500.00 over and above all his debts and liabilities in property within this Territory not by law exempt from execution and exclusive of all property exempt from levy and sale on execution; and said H. L. Hollister for himself says that he is a resident and freeholder of the county of Minnehaha, in this Territory, and that he is worth the sum of $500.00 over and above all his debts and liabilities in property in this Territory not by law exempt from execution and exclusive of all property exempt from levy and sale on execution.

R. J. WELLS.
H. L. HOLLISTER.
W. R. KINGSBURY.

Subscribed and sworn to before me this 23 day of August, 1888.

E. S. McDONALD,
[SEAL.] *Notary Public.*

(Endorsed:) Territory of Dakota, county of Moody. In district court. Undertaking on appeal to supreme court. Personal service of the within undertaking, by copy, admitted this 27th day of August, 1888. H. H. Keith, att'y for plaintiff & respondent. Filed at 3 o'clock p. m. on September 1st, 1888. Alex. J. George, clerk of the district court, Moody county, Dakota. Supreme court of the Territory of Dakota. Filed Sep. 27, 1888. J. H. C. Young, clerk.

11 TERRITORY OF DAKOTA, } ss:
*Fourth Judicial District,* }

In the District Court within and for Minnehaha County, and upon Change of Venue Taken to Moody County.

THE SIOUX FALLS NATIONAL BANK, Plaintiff and Respondent,
*vs.*
THE FIRST NATIONAL BANK OF SIOUX FALLS, Defendant and Appellant.

Whereas, on the 9th day of March, 1886, in the district court within and for the county of Minnehaha, an order was made denying the motion made by said defendant, The First National Bank of Sioux Falls, to dissolve the attachment issued in said action on the 1st day of March, 1886, against the property of said First National Bank of Sioux Falls;

And the above-named appellant, feeling aggrieved hereby, intends to appeal therefrom to the supreme court of the Territory of Dakota:

Now, therefore, we do hereby undertake that the said appellant will pay all costs and damages which may be awarded against it on said appeal or on dismissal thereof, not exceeding two hundred and fifty dollars.

Dated August 23rd, 1888.

R. J. WELLS.
W. R. KINGSBURY.
H. L. HOLLISTER.

TERRITORY OF DAKOTA, } ss:
*Minnehaha County,* }

On this 23 day of August, A. D. 1888, before me, the subscriber, appeared R. J. Wells, W. R. Kingsbury, & H. L. Hollister, to me personally known to be the same persons described in and who executed the above undertaking, and severally acknowledged that they executed the same.

12 In witness whereof I have hereunto set my hand
[SEAL.] and official seal the day and year above written.

E. S. McDONALD,
*Notary Public.*

TERRITORY OF DAKOTA, } ss:
*County of Minnehaha,* }

R. J. Wells, W. R. Kingsbury, & H. L. Hollister, being severally sworn, each for himself says: The said R. J. Wells & W. R. Kingsbury each for himself says he is a resident and freeholder of the county of Minnehaha, in this Territory, and that he is worth the sum of $500.00, over and above all his debts and liabilities, in property within this Territory not by law exempt from execution and exclusive of all property exempt from levy and sale on execution; and the said H. L. Hollister for himself says that he is a resident and freeholder of the county of Minnehaha, in this Territory, and that he is worth the sum of $500.00, over and above all his debts and lia-

bilities, in property within this Territory not by law exempt from execution and exclusive of all property exempt from levy and sale on execution.

R. J. WELLS.
H. L. HOLLISTER.
W. R. KINGSBURY.

Subscribed and sworn to before me this 23 day of August, 1888.

E. S. McDONALD,
[SEAL.] *Notary Public.*

(Endorsed:) Territory of Dakota, county of Moody. In district court. Undertaking on appeal to supreme court. Personal service of the within undertaking by copy admitted this 27th day of August, 1888. H. H. Keith, att'y for plaintiff & respondent. Filed at 3 o'clock p. m. on September 1st, 1888. Alex. J. George, clerk of the district court, Moody county, Dakota. Supreme court of the Territory of Dakota. Filed Sep. 27, 1888. J. H. C. Young, clerk.

13 TERRITORY OF DAKOTA, } *ss.*
*County of Moody,* }

In District Court, Fourth Judicial District.

THE SIOUX FALLS NATIONAL BANK, Plaintiff and Respondent,
*vs.*
THE FIRST NATIONAL BANK OF SIOUX FALLS and J. Leslie Thompson, as Receiver of the First National Bank of Sioux Falls, Defendants and Appellants. } Certificate.

I, Alex. J. George, clerk of the district court in and for Moody county, Dakota, do hereby certify that the foregoing papers, to wit, summons, complaint, answer of each defendant, reply, application of defendant Thompson to be substituted as defendant, order making him a party, and exception, bill of exceptions, verdict, judgment, assignment of errors signed by T. B. McMartin, attorney for Thompson; notice of appeal, and undertaking upon the same by defendant Thompson, are the original papers in said action and are transmitted herewith to the supreme court of the Territory of Dakota pursuant to the appeal of said Thompson, as receiver as aforesaid, from the judgment in said action.

In witness whereof I have hereunto set my hand and the seal of said court this 18th day of September, A. D. 1888.

[SEAL.] ALEX. J. GEORGE,
*Clerk of the District Court, Moody County, Dakota.*

(Endorsed:) Supreme court of the Territory of Dakota. Filed Sep. 27, 1888. J. H. C. Young, clerk.

14 TERRITORY OF DAKOTA, } ss:
*County of Moody,* }

In District Court, Fourth Judicial District.

THE SIOUX FALLS NATIONAL BANK, Plaintiff and Respondent,
*vs.*
THE FIRST NATIONAL BANK OF SIOUX FALLS and J. LESLIE Thompson, as Receiver of the First National Bank of Sioux Falls, Defendants and Appellants.

I, Alex. J. George, clerk of the district court in and for Moody county, Dakota Territory, do hereby certify that the foregoing papers, to wit, the summons, complaint, the answer of each defendant, the reply, the bill of exceptions, including therein the motion for new trial and the order overruling the same; the verdict, the judgment, the assignment of errors by the defendant The First National Bank, the notice of appeal from the judgment by the First National bank, and the undertaking on such appeal, are the original papers in said action and are transmitted herewith to the supreme court of the Territory of Dakota pursuant to the appeal of the defendant First National Bank of Sioux Falls from the judgment in said action; and I further certify that the affidavit of Charles E. McKinney, dated February 27, 1886, for the attachment, issued on the first day of March, 1886, against the defendant The First National Bank of Sioux Falls; the undertaking on such attachment, the warrant of attachment dated March 1st, 1886; the return endorsed thereon, signed Joseph M. Dixon, sheriff; the Exhibit A and the inventories A and B thereto attached, the order to show cause, dated March 2, 1886; the order of continuance of said motion, the order dated March 9th, 1886, denying the motion to dissolve said attachment, and a certified copy of the order changing
15 the place of trial in said action, certified by the clerk of the district court of Minnehaha county and filed in the office of the clerk of the district court of Moody county on the 9th day of December, 1886; the notice of appeal from said order of March 9th, 1886, and the undertaking on such appeal, are the original papers in said action and are transmitted herewith to the supreme court of the Territory of Dakota pursuant to said appeal by the defendant The First National Bank from said order of March 9th, 1886.

Witness my hand and the seal of such court this 18th day of September, 1888.

ALEX. J. GEORGE,
[SEAL.] *Clerk of District Court, Moody County, Dakota.*

(Endorsed:) Supreme court of the Territory of Dakota. Filed Sep. 27, 1888. J. H. C. Young, clerk.

16 *Assignment of Errors.*

And the appellant herein, The First National Bank of Sioux Falls, says there is manifest error on the face of the record in this:

1. The court erred in refusing to permit the witness Furbeck to answer the question whether it was a common occurrence to find checks of the amount and like the one in suit in the business of Sioux Falls banks.

2. The court erred in admitting in evidence, against the objection of defendants, the statement, Exhibit "B," as follows:

FIRST NATIONAL BANK, SIOUX FALLS, DAKOTA.

The books of the bank show a credit in favor of the county of $15,625.01. If you wish, you have the privilege of examining the books.

R. J. WELLS, *President.*
W. F. FURBECK, *Cashier.*

3. The court erred in refusing to permit the witness Furbeck to answer the question whether the check in suit was ever charged up in cashier's check account.

4. The court erred in refusing the offer of the defendants to show by the witness Hollister that the bondsmen of Howard knew that he was behind in his accounts and had been a defaulter for a number of years prior to this settlement; that Hollister, as cashier of the defendant bank, had, at many of the settlements in January and July of each year, taken money or checks to the commissioners when Howard was a defaulter; that he expected the officers of the defendant bank would at this time follow that custom and present a check to the commissioners, and that he and the other bondsmen would then step in and ask the commissioners to turn the funds over to them.

17 5. The court erred in refusing the offer of the defendants to show by the same witness that the Dakota National bank, when the check was offered to it for deposit, refused to receive or give credit or purchase the check without the endorsement or indemnity of the bondsmen, and that an arrangement was then partially entered into for such indemnity and to deposit the funds, and that it was finally arranged that if the plaintiff did not take the check without endorsement the bondsmen would bring it back to the Dakota National bank.

6. The court erred in refusing the defendants' offer to show by the same witness that the president of the plaintiff called for the witness to come down and see him, and in that conversation wanted the witness to help defray the expenses of this suit, and said, "I have helped you out, and you had better help me out."

7. The court erred in refusing to permit the witness to answer the question, "Did you ever receive a check of $16,000, as a banker, without endorsement by the party presenting it?"

8. The court erred in refusing to permit the witness Porter P. Peck to answer the following question: "How often in your experience as a banker in Sioux Falls have you handled an individual check of the amount of $16,000?"

9. The court erred in refusing to permit the witness Corson to answer the following question: "Was anything said at the Dakota

National bank about your giving a bond at the time?" as also the following question: "Did you know the state of Mr. Howard's account—of his being in default with the county treasury?"

10. The court erred in overruling each and every of the exceptions taken and filed in writing by defendants to the testimony of the witness Howard.

18 11. The court erred in overruling the objection of defendants to the reading of the portions of the deposition of the witness Howard which were *accepted* to by written exceptions on file before passing upon such exceptions.

12. Also in overruling the objection of defendants to the reading of said portions of said deposition without passing upon said written exceptions filed.

13. Also in denying defendants' motion to strike out the testimony of the witness Howard as follows: "I first appeared before the board with the bank book. I afterwards appeard with the letter from the president of the bank, and my recollection is that this last transaction was quite late in the day."

14. Also in overruling defendants' motion to strike out the testimony of the witness Howard concerning Mr. Young and Mr. Hollister and the management of the First National bank whish existed prior to the time when Wells and Furbeck were in the management.

15. Also in overruling the motion of defendants to strike out the testimony of said witness concerning the Steevers drafts.

16. Also in overruling the defendants' motion to strike out all the testimony of said witness beginning, "A. I had the money in connection with the bank book," and ending, "They said no doubt that all was proper, but they would like to have some little further assurance that I had the stuff—the money."

17. Also in refusing to strike out the words "more conclusive," contained in the testimony of the said witness.

18. Also in refusing to strike out the following question: "Q. Well, what was done by the officers of the bank, Mr. Wells and Mr. Furbeck?" and the answer to said question down to and including the words "bed rock."

19 19. The court erred in receiving any testimony of this witness concerning his bank book, the statement to the county board, and the Steevers drafts and Howard's notes.

20. The court erred in permitting the following testimony from the witness Thompson: "Q. What did the bank book show? A. I do not know enough about bank books to state what it did show in it. I am not an expert in bank books. The other members of the board examined the bank book. The board refused to take that in settlement, and told Mr. Howard to go down and either bring up the money or a certified check. Q. What did he do? A. He went back to the bank and brought up a letter certified, I think, by both the president and the cashier of the First National bank."

21. The court erred in allowing the witness McKee to testify as follows: "I examined the bank book of Mr. Howard. Q. What did the bank book show as the amount of the assets he had at the

First National bank belonging to the county? A. If I remember right it showed a credit of somewhere about $15,000 or $16,000. I examined the book to see. We would not accept the settlement. We would not take the bank book, and told him we had got to have something more definite than the bank book. He then went back down to the bank and brought up a slip of paper (Exhibit 'B' in this case that I have heard read). They passed it over to me, and I examined and read it and passed it over to the district attorney, who said it was only a letter of credit, and told Mr. Howard that we had got to have something more definite than that."

22. The court erred in refusing defendants' motion to strike out the testimony of C. E. McKinney that he treated cashier's checks of the defendant bank as cash.

23. The court erred in granting plaintiff's motion to direct a verdict in favor of the plaintiff.

24. The court erred in directing a verdict in favor of the plaintiff.

25. The court erred in overruling defendants' motion for a new trial.

26. The court erred in rendering judgment upon the verdict.

WILKES & WELLS AND
BOYCE & BOYCE,
*Attorneys for the First National Bank,*
*Defendant and Appellant.*

*Assignment of Error on Appeal from the Order of March 9, 1888.*

The appellant, The First National Bank of Sioux Falls, says there is manifest error appearing upon the face of the record herein, in that the court erred in denying the defendants' motion to dissolve the attachment issued herein on the first day of March, 1886, because the property of national banks is not attachable before final judgment in any case.

WILKES & WELLS AND
BOYCE & BOYCE,
*Attorneys for said Appellant, The First*
*National Bank of Sioux Falls.*

TERRITORY OF DAKOTA, }
*County of Minnehaha.* }

In District Court, Fourth Judicial District.

SIOUX FALLS NATIONAL BANK, Plaintiff,
*vs.*
THE FIRST NATIONAL BANK OF SIOUX FALLS, Defendant.

Charles E. McKinney, being duly sworn, says that he is the president of The Sioux Falls National Bank, the plaintiff in the above-entitled action, and that he makes this affidavit in behalf of said plaintiff.

The deponent further says that said action is brought for the recovery of money, and a summons has been issued therein.

That a cause of action exists against the defendant and in favor of the plaintiff herein, and that the amount of said plaintiff's claim is sixteen thousand five hundred and seventy-one dollars and sixty-one cents ($16,571.61) and interest thereon from January 13th, A. D. 1886, and that the grounds thereof are as follows—that is to say:

On the 12th day of January, A. D. 1886, the said defendant, The First National Bank of Sioux Falls, by its cashier, W. F. Furbeck, issued its check in the form and figures following, to wit:

"No. 91. SIOUX FALLS, DAK., *Jan.* 12, 1886.

The First National Bank of Sioux Falls

Pay to the order of C. K. Howard, Co. treas., sixteen thousand five hundred and seventy-one and $\frac{61}{100}$ dollars.

$16,571.61. W. F. FURBECK, *Cashier.*"

That said check was issued and delivered by said defendant to C. K. Howard and was by said C. K. Howard endorsed in the form following, to wit: "C. K. Howard, county treas."

That the plaintiff received said check in the ordinary
22 course of business and for full value and is now the owner and holder of said check.

That said sum of sixteen thousand five hundred and seventy-one dollars and sixty-one cents and interest thereon as aforesaid is now due plaintiff from defendant.

That the defendant is a foreign corporation, to wit, a banking association, created by and under the laws of the United States and doing business under the name and style of the First National Bank of Sioux Falls, located at Sioux Falls, Minnehaha county, Dakota Territory, and owns and possesses property in said county.

That the debt which, as aforesaid, exists against the defendant and in favor of the plaintiff was incurred from property obtained by the fraud and false pretenses of the said defendant.

That this deponent verily believes and charges the truth to be that the said defendant has assigned and disposed of or is about to assign and dispose of its property with intent to defraud its creditors and especially the plaintiff herein.

That the defendant has been and now is negotiating with the Minnehaha National bank, located at Sioux Falls, Dakota, for the purpose of assigning and disposing of its securities and deposits to the said Minnehaha National bank, and this deponent is informed and believes and charges the truth to be that by the proposed terms of said assignment and disposal of defendant's securities and deposits to said Minnehaha National bank no provision whatever is to be made for the payment of plaintiff's said claim, and that the property of defendant will thereby be placed beyond the reach of
the plaintiff, and this deponent believes that the purpose of
23 said assignment of deposits and securities to the said Minnehaha National bank is for the purpose of preventing the

pl'ff from collecting its demand and with the intent to cheat and defraud the plaintiff herein.

CHARLES E. McKINNEY.

Subscribed and sworn to before me this 27th day of Feb'y, 1886.

A. FRIZZELL,
*Notary Public.*

[SEAL.]

(Endorsed:) District court, Minnehaha county. Sioux Falls National Bank against The First National Bank of Sioux Falls. Affidavit. Keith & Young, attorneys for plaintiff, Sioux Falls, Dakota. Filed March 1st, 1886, at 11 o'clock a. m. & 15 minutes. Cyrus Walts, clerk. Supreme court of the Territory of Dakota. Filed Sep. 27, 1888. J. H. C. Young, clerk.

21 TERRITORY OF DAKOTA, } ss:
*County of Minnehaha,* }

District Court, — Judicial District.

THE SIOUX FALLS NATIONAL BANK, Plaintiff,
*against*
THE FIRST NATIONAL BANK OF SIOUX FALLS, Defendant.

Whereas The Sioux Falls National Bank, the above-named plaintiff, has commenced an action by summons for the recovery of money against The First National Bank of Sioux Falls, said defendant, and has made or is about to make application for a warrant of attachment against the property of said defendant in pursuance of the statue in such case made and provided:

Now, therefore, if the said First National Bank of Sioux Falls, the defendant, recover judgment against the said plaintiff, or if the attachment be set aside by order of the court, we, The Sioux Falls National Bank, said plaintiff, as principal, and C. E. McKinney and John McClellan and William Van Eps, as sureties, undertake, promise, and agree to and with the said defendant that the said plaintiff shall and will pay all costs that may be awarded to said defendant and all damages it may sustain by reason of the said attachment, not exceeding the sum of seventeen thousand dollars.

Dated this 27th day of February, A. D. 1886.

SIOUX FALLS NAT'L BANK, [SEAL.]
By C. E. McKINNEY, *Pt.* [SEAL.]
C. E. McKINNEY. [SEAL.]
JOHN McCLELLAN. [SEAL.]
WM. VAN EPS. [SEAL.]

Signed, sealed, and delivered in presence of—
A. FRIZZELL.
S. E. YOUNG.

25 TERRITORY OF DAKOTA, } ss:
*County of Minnehaha,* }

On this 27th day of February, in the year one thousand eight hundred and eighty-five, before me, A. Frizzell, a notary public in

and for said county and Territory, personally appeared Charles E. McKinney and John McClellan, known to me to be the persons who are described in and who executed the foregoing and within instrument, and Charles E. McKinney acknowledged to me that he executed the same in behalf of the Sioux Falls National bank as president of said bank, and also in his own behalf as surety, and said John McClellan also acknowledged that he executed the foregoing instrument.

A. FRIZZELL,
*Notary Public.* [SEAL.]

TERRITORY OF DAKOTA, } ss:
*County of Minnehaha,* }

C. E. McKinney and John McClellan, being duly sworn, say each for himself that he is one of the sureties above named; that he is a resident and freeholder of Minnehaha county, of the Territory of Dakota, and worth the amount of seventeen thousand dollars specified in the within undertaking above his debts and liabilities and exclusive of his property exempt from execution.

C. E. McKINNEY.
JOHN McCLELLAN.

Subscribed and sworn to before me this 27 day of February, A. D. 1886.

A. FRIZZELL,
[SEAL.] *Notary Public, D. T.*

TERRITORY OF DAKOTA, } ss:
*Minnehaha County,* }

On this 1st day March, 1886, before me personally came
26 William Van Eps, known to me to be the same person described in and who executed the foregoing undertaking & instrument, and acknowledged to me that he executed the same for the uses & purposes therein mentioned.

A. FRIZZELL,
[SEAL.] *Notary Public.*

TERRITORY OF DAKOTA, } ss:
*Minnehaha County,* }

William Van Eps, being duly sworn, says that he is one of the sureties above named; that he is a resident and freeholder of Minnehaha county, Territory of Dakota, and worth the amount of seventeen thousand dollars ($17,000) specified in the within undertaking above his debts & liabilities and exclusive of his property exempt from execution.

WM. VAN EPS.

Sworn to before me this 1st day of March, 1886.

A. FRIZZELL,
[SEAL.] *Notary Public.*

(Endorsed:) District court, fourth judicial district, county of Minnehaha. The Sioux Falls Nat. Bank against The First Nat. Bank of Sioux Falls. Undertaking for attachment. I approve the within undertaking and the sureties thereto. Dated March 1st, A. D. 1886. Cyrus Walts, clerk. (Seal.) Keith & Young, plaintiff's attorney-. Filed March 1st, 1886, at 11 o'clock & 15 minutes. Cyrus Walst, clerk supreme court of the Territory of Dakota. Filed Sep. 27, 1888. J. H. C. Young, clerk.

27 TERRITORY OF DAKOTA, } ss:
*County of Minnehaha,* }

District Court, 4th Judicial District.

THE SIOUX FALLS NATIONAL BANK, Plaintiff,
*against*
THE FIRST NATIONAL BANK OF SIOUX FALLS, Defendant.

The Territory of Dakota to the sheriff of the county of Minnehaha, Greeting:

Whereas an application has been made to me in the above-entitled action for a warrant of attachment against the property of The First National Bank of Sioux Falls, defendant therein;

And whereas the affidavit of Charles E. McKinney, which has been presented to me on such application, states that a cause of action upon contract for the recovery of money exists against said defendant in favor of said plaintiff, and that the amount of plaintiff's said claim and demand is the sum of sixteen thousand five hundred and seventy-one dollars and sixty-one cents, specifying as the grounds thereof that the said defendant, by its cashier, W. F. Furbeck, issued its cashier's check, payable to C. K. Howard, Co. treas., or order, for the sum above stated, and was by said C. K. Howard endorsed in blank, and said check was by plaintiff taken in the ordinary course of business and for full value, and that plaintiff is now the owner and holder of the same, and that said sum of sixteen thousand five hundred and seventy-one dollars and sixty-one cents, with interest from Jan. 13, 1886, is now due said pl'ff, and that the defendant is a foreign corporation, to wit, a banking association, organized under the laws of the United States; that the debt was incurred from property
28 obtained by false pretenses of the defendant, and that defendant has assigned and disposed of or is about to assign and dispose of its property with intent to defraud its creditors, especially the said plaintiff, and prays that an attachment issue according to the provisions of the statute in such case made and provided, and said plaintiff having given the undertaking required by law:

Now, you are hereby commanded and required to attach and safely keep all the property of said defendant, The First National Bank of Sioux Falls, within your county not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand above stated, together with costs and expenses, as security for the satisfaction of such judgment as said plaintiff may recover in said action, unless the defendant give you security by the under-

taking of at least two sufficient sureties in an amount sufficient to satisfy said plaintiff's demand, besides costs, or in an amount equal to the value of the property which has been or is about to be attached, in which case you will take such undertaking, and when this warrant shall be fully executed or discharged you are required to return the same, with your proceedings thereon, to this court.

Witness the Honorable C. S. Palmer, judge of the district court in and for said Minnehaha county, and the seal of said court this 1st day of M'ch, A. D. 1886.

[SEAL.] CYRUS WALTS,
*Clerk of Court.*

29 TERRITORY OF DAKOTA, } ss:
*County of Minnehaha,* }

I hereby certify and return that the within warrant of attachment came into my hands for execution on the first day of March, A. D. 1886, and that I executed the same on the same day by attaching and taking into my possession all that certain property of the within defendant described in the annexed inventory marked "Inventory A" and made a part hereof, and that I held the same in my possession until the 5th day of March, 1886, on which day, by direction of the attorneys for plaintiff, I tendered back to said defendant all said property except that described in the inventory hereto annexed marked "Inventory B" and made part hereof by delivering to R. J. Wells, president of the defendant bank, a true copy of said Inventory "B" with a copy of the notice annexed hereto, marked "Exhibit A."

JOSEPH M. DICKSON, *Sheriff.*

As a further return upon the within warrant of attachment I hereby certify that on this 31st day of March, 1886, by order of the plaintiff herein, I delivered the property described in Inventory "B," hereto attached, to J. Leslie Thompson, the receiver of defendant. Dated this 31st day of March, 1886.

*Sheriff's Fees.*

| | |
|---|---|
| Levying writ of attachment | 1 00 |
| Copy | 25 |
| Mileage | 20 |
| To making inventory | 25 00 |
| " 5 days' custody & care ($123,489.49) | 100 00 |
| " 26 " " " " ($27,541.21) | 260 00 |
| " commission on $400 at 3% | 12 00 |
| " " " 600 at 2% | 12 00 |
| " " " 15,571.61 at 1% | 155 72 |
| Total | $566 17 |

(Endorsed:) District court, fourth judicial district, county of Minnehaha. The Sioux Falls Nat. Bank against The First
30 Nat. Bank of Sioux Falls. Warrant of attachment. Issued March 1st, A. D. 1886. Cyrus Walts, clerk of said clerk. Returned May 1st, 1886, & filed. Cyrus Walts, clerk of said court. Supreme court of the Territory of Dakota. Filed Sep. 27, 1888. J. H. C. Young, clerk.

31 "EXHIBIT A."

To R. J. Wells, president of the First National bank, Sioux Falls, D. T.

SIR: I hereby tender to you and the officers of said above-mentioned bank a return of all notes, stocks, securities, bank fixtures, and furniture and all of the property of every kind and nature, together with the keys and possession of said bank, taken by me upon the attachment of the Sioux Falls National bank on the 1st day of March, 1886, except that portion thereof mentioned in the list hereto attached; which last-mentioned property is retained by me upon the above-mentioned attachment and another attachment issued at the suit of Thos. Fullerton *et al.*

Dated this 5th day of March, 1886.

JOSEPH M. DICKSON,
*Sheriff, Minnehaha Co., D. T.*

Service of the within by copy admitted this 8th day of March, 1886, at 5.15 a. m.

R. J. WELLS,
*Pres. 1st National Bank.*

*Sheriff's Fees.*

| | |
|---|---|
| Service & return | 60 |
| Copies | 75 |
| Mileage | 20 |
| | $1 55 |

(Endorsed:) Supreme court of the Territory of Dakota. Filed Sep. 27, 1888. J. H. C. Young, clerk.

32 "INVENTORY A."

*List of Cash Item Dept. in 1st Nat. Bank Safe by J. M. Dickson* 3, 2, 1886.

| | | |
|---|---|---|
| Gold | 2,800 | |
| Silver in sacks | 1,450 | 00 |
| " " box | 125 | 50 |
| Mut. c'cy & mut'd coin | 239 | 60 |
| City warrants | 39 | 20 |

| | | |
|---|---|---|
| C'ks on Sioux Falls Nat. | 25 | 63 |
| Citizens' b'k | 25 | |
| " | | 25 |
| " | 70 | |
| " | 6 | 40 |
| " | 100 | |
| Due bill, Am. Exp. Co. | 100 | |
| Tax rec'pt | 85 | 12 |
| Smith, order on Holt | 7 | |
| Winsor & Swezy, unpaid d'ft | 348 | 25 |
| W. S. Potter, coll. p'd by bank | 6 | |
| Hay ticket, signed H. J. Nichols | 30 | 50 |
| | 5,458 | 45 |

(Endorsed:) Supreme court of the Territory of Dakota. Filed Sep. 27, 1888. J. H. C. Young, clerk.

33 *List of Notes Attached by J. M. Dickson, Sheriff, March 1st, 1886.*

| | | | |
|---|---|---|---|
| 6580 | Geo. A. Knott, S. 50 shares B. Co. S. | 5,000 00 | |
| 6573 | J. W. Tope, unsecured | 1,060 00 | |
| 6634 | Kingsbury, C. S., S. 26 shares of G. stock | 1,720 00 | |
| 6637 | T. G. Brown | 140 00 | |
| | | | 7,860 |
| 5914 | G. H. Winsor, real est. mort., Canton | 1,000 00 | |
| 6180 | Fred. Pichotte, Sioux F. B. Co. guar. real est. col. | 5,600 00 | |
| 6558 | Plainview F. & Stock Raising Co., chat. & real est. M. | 5,000 00 | |
| | | | 11,600 |
| 6392 | Plainview F. & Stock Raising Co., chat. & real est. M. | 5,000 00 | |
| 6008 | Margaret Reed | 245 00 | |
| 6009 | Do. | 245 00 | |
| 6010 | Do. real est. mort. | 245 00 | |
| | | | 5,735 |
| 6014 | Ole Larson | 200 | |
| " 15 | Do. | 200 00 | |
| " 15 | Do. real estate | 200 | |
| " 17 | " | 200 | |
| " 18 | " | 200 | |
| " 13 | " | 200 | |
| | | | 1,200 |
| 5999 | Wm. Hoffman and | 250 | |
| 6000 | Cora E. Hoffman | 250 | |
| 6001 | Real est. (160) A. | 250 | |
| | | | 750 |
| 6709 | Isaac Clemens and | 325 | |
| 6710 | Belle Clemens, real est. | 325 | |
| | | | 650 |

| | | | |
|---|---|---|---|
| 5985 | John Rudd, chat. | 300 00 | |
| 6471 | Sioux Falls B. Co., real est. | 6,000 00 | |
| | | | 6,300 |
| | | | 34,095 00 |

34

| | | | |
|---|---|---|---|
| 6561 | Sioux F. Brew. Co. | 5,000 00 | |
| 6464 | Geo. A. Knott, 50 share- Brew. S. | 4,150 79 | |
| 6581 | G. A. Knott | 5,000 00 | |
| | | | 14,150 79 |
| 6720 | J. B. Cloudas & W., mort. R. E. | 400 00 | |
| 6629 | W. F. Furbeck | 1,344 94 | |
| 1514 | Bill of sale of 5,000,000 brick, N. B. Kindred | 3,000 00 | |
| 6619 | C. Thompson, chat. M. | 63 50 | |
| | | | 4,808 44 |
| 6737 | J. H. Miller, Jr., 855 shares of Grand Haven gas stock ($50) | 1,500 00 | |
| 6729 | Porter P. Peck, 121 shares of Temple | 3,000 00 | |
| 6735 | A. H. Peck and P. P. Peck, same security as above | 2,000 00 | |
| | | | 6,500 |
| 6672 | C. Wohlsent, chat. | 243 54 | |
| 6072 | Peter Wall and Ben. Durckson, chat. | 300 00 | |
| 6615 | John Graham, chat. | 29 40 | |
| 6648 | H. A. Foster, chat. & 2d mort. on real est. | 664 83 | |
| | | | 1,237 77 |
| 6674 | Elias Larson, chat. | 277 00 | |
| 6700 | R. F. Williams, chat. | 114 29 | |
| 6596 | Knut J. Onestad | 41 | |

35

| | | | |
|---|---|---|---|
| 6702 | A. Froebel and F. C. Frebel | 114 00 | |
| 6706 | Jacob Durkson, chat. | 335 00 | |
| 6593 | Barney Peshong, chat. | 95 | |
| 6719 | August & Wm. Gratz, chat. | 280 | |
| 6565 | M. B. Spencer, sheriff's certif. | 120 | |
| 6567 | James Bover | 100 00 | |
| 5744 | F. C. Miller, chat. | 47 60 | |
| 6582 | B. S. Petterson, chat. | 125 00 | |
| 6721 | Wm. Gratz | 336 15 | |
| 6512 | N. B. & Mary Kindred, real est. | 1,779 70 | |
| 6716 | Sioux Falls B. Co. | 1,000 00 | |
| | | | 4,332 45 |
| | One hundred and fifty shares of Dak. Cattle Co., par value ($100) | 9,000 00 | |
| | 120 shares of gas stock, par $100 | 9,600 00 | |
| | | | 18,600 00 |

| | | | |
|---|---|---|---|
| | One Hall burglar-proof safe with fine lock, one set of vault doors, bank furniture and fixtures, including counters, desks, and the bank books and papers | 2,500 00 | |
| | | | 2,500 00 |
| 36 | *List of Notes Levied on by J. M. Dickson, Sheriff, in an Attachment Suit Against the 1st Nat. Bank by the Sioux Falls Nat. Bank, Both of Sioux Falls, D. T.* | | |
| | 248 shares of Plainview Stock R. Asso., 2 $100 | 24,800 | |
| | 3 shares of Sioux Falls Brewing Co., $100 | 300 | |
| 6687 | W. C. Boyce | 47 50 | |
| 6045 | John A. Birdsell | 58 75 | |
| 6140 | A. F. and Alfred Larson, real est. M. on Val. Sp'gs property | 662 00 | |
| 6683 | W. A. Wilkes, guaranteed by R. J. Wells | 3,000 00 | |
| 6682 | E. T. Wilkes (R. J. Wells) | 3,400 00 | |
| 6684 | S. L. Wells | 2,000 00 | |
| 6630 | G. W. Vandeveer, chat. | 73 50 | |
| 6591 | A. F. Davenport | 100 00 | |
| 6707 | Edw'd Ellis | 200 00 | |
| 6562 | W. S. Martin, chat. | 24 00 | |
| 6708 | I. P. Babcock, chat. | 21 60 | |
| 6748 | Morritz Levinger | 2,000 00 | |
| | | | 14,287 35 |
| 6661 | W. A. Wilkes | 60 00 | |
| 6724 | H. C. Aldrich | 100 00 | |
| 6741 | E. Euch, houses & woodland | 114 26 | |
| 6577 | H. H. Moore, chat. | 65 00 | |
| 6635 | E. C. Kibbe, chat. | 42 25 | |
| 6208 | G. W. Patton, guaranteed by (C. K. | | |
| 37 | Howard) | 1,298 41 | |
| 6645 | M. Harelson (chattel) | 44 | |
| 6655 | G. W. Bigelow, chat. | 50 | |
| 6511 | Henry Collender (O. P. Weston), real est. M. | 3,139 56 | |
| 6639 | E. H. Darrow | 25 00 | |
| 6642 | E. A. Packard, chat. | 103 | |
| 6753 | W. R. Kingsbury | 75 97 | |
| 6656 | C. H. Brooks, chat. | 11 25 | |
| 6740 | J. and James Warren | 40 00 | |
| 6681 | Sioux Falls university (Edw'd Ellis) | 100 00 | |
| | | | 5,268 70 |
| 6722 | Wm. and Aug. Gratz, chat. | 150 00 | |
| 6625 | Henry W. Smith | 104 76 | |

| | | | |
|---|---|---|---|
| 6623 | John Scheper, chat. | 110 00 | |
| 6696 | John W. Callender | 144 34 | |
| 6255 | E. Dorr and E. M. Shotwell | 55 00 | |
| 6678 | W. S. Potter, chat. | 30 00 | |
| 6717 | F. E. Vandemark | 26 00 | |
| 6548 | Erick Mortenson, chat. | 35 00 | |
| 6651 | John D. Walker, chat. | 94 85 | |
| 6668 | Wm. Rost | 131 60 | |
| 6666 | J. A. Hooker, chat. | 48 42 | |
| 6743 | Wm. E. Carman, chat. | 50 00 | |
| 6745 | Thomas Quigley | 30 00 | |
| 38 | | | |
| 6513 | N. B. & Mary Kindred, real est. mort. on house & block | 1,328 50 | |
| 6752 | Gottlob Kolsch and Ludwig Lewbert | 384 | |
| 6614 | Henry W. Smith | 100 00 | |
| 6689 | H. H. Moore, chat. | 30 75 | |
| | | | 2,853 22 |
| 6638 | Knut Iverson | 131 55 | |
| 6566 | John Lasche (A. Frizzell) | 70 32 | |
| 6714 | Sioux Falls Brew. Co. | 1,000 00 | |
| 6690 | Thomas Johnson, chat. | 37 35 | |
| 6646 | Peter Iverson, chat. | 51 35 | |
| 6571 | Per J. J. Mardal, chat. | 25 00 | |
| 6616 | Iver Sorenson, chat. | 44 00 | |
| 5766 | W. R. Kingsbury | 250 00 | |
| 6742 | Dak. Farm Imp. & Loan Co., real est. security as collateral | 500 00 | |
| 6751 | W. F. Furbeck | 1,000 00 | |
| 6223 | A. Boyniton, real est. | 800 00 | |
| 5639 | S. D. Alguir, chat. | 85 00 | |
| 6285 | C. T. Clausen, chat. | 95 00 | |
| 6592 | E. W. Caldwell | 100 00 | |
| 6207 | Simon Carlson | 30 00 | |
| 6167 | Peter A. Dutel | 154 00 | |
| 5993 | C. Durksen | 72 00 | |
| 6280 | Ole L. Elstad | 18 10 | |
| | | | 4,463 67 |
| 39 | | | |
| 6278 | Enger Ellefson | 73 10 | |
| 5992 | Daniel Eliason | 10 00 | |
| 5752 | Amon Johnson, real est. | 300 00 | |
| 5719 | Wm. Gable, chat. | 175 00 | |
| 6259 | A. T. Hamre | 69 00 | |
| 5619 | W. M. Kennon | 25 00 | |
| 5908 | James Kellar | 69 25 | |
| 6205 | John Kemis, chat. | 200 00 | |
| 6005 | C. Larson, chat. | 140 00 | |
| 6008 | Geo. Larson | 7 00 | |
| 6204 | Ole H. Lee | 17 00 | |

| | | | | |
|---|---|---|---|---|
| 5781 | B. F. Lansing, cash | 49 85 | | P'd 3-3 |
| 5806 | A. L. Marcy | 182 56 | | |
| 5809 | A. L. Marcy | 10 70 | | |
| 5783 | J. T. McGarrough | 5 50 | | |
| 6054 | Wm. McKee | 33 76 | | |
| 6419 | J. B. Proctor | 237 66 | | |
| 6225 | John McKee | 1,000 | | |
| 6168 | G. Murray | 60 00 | | |
| 6260 | S. Nilson | 18 72 | | |
| 5594 | Albert Reynolds | 100 00 | | |
| | | | 2,784 | 10 |
| 5627 | S. Bergerson | 15 00 | | |
| 5637 | F. W. Nuruberg | 57 | | |
| 6698 | R. F. Pettigrew | 20 00 | | |
| 6137 | E. A. Rowley | 193 63 | | |
| 5593 | J. R. Richardson | 275 00 | | |
| 5980 | Frank Stowt | 105 00 | | |
| 5624 | W. J. Sterns | 35 85 | | |
| 40 | | | | |
| 6064 | Lizzie Spooner, chat | 30 00 | | |
| 6063 | Lizzie Spooner, chat | 30 00 | | |
| 5899 | M. Fideman | 14 00 | | |
| 6631 | M. B. Spencer | 25 00 | | |
| 6218 | C. D. Sterns | 61 62 | | |
| 6649 | School order, dist. 14, Min. | 41 11 | | |
| 6114 | School order No. 83, Min. | 32 00 | | |
| 6112 | Do. | 12 | | |
| 6113 | Do. | 40 00 | | |
| 5882 | Dist. 35, Lin. Co. | 10 00 | | |
| 6091 | James Shaffer | 33 75 | | |
| 6032 | Edw'd Stone, real est. | 199 00 | | |
| 5905 | F. E. Vandermark | 50 00 | | |
| 5997 | Henrick Wall | 92 40 | | |
| | | | 1,372 | 36 |
| 5915 | R. H. Williams | 48 75 | | |
| 6403 | E. G. Wright | 72 00 | | |
| 6351 | C. F. A. Westphol | 24 00 | | |
| 5860 | Jacob Widel | 200 00 | | |
| | | | 344 | 75 |

(Endorsed:) Supreme court of the Territory of Dakota. Filed Sep. 27, 1888. J. H. C. Young, clerk.

41 "INVENTORY B."

| | | | |
|---|---|---|---|
| | Gold coin | 2,800 | 00 |
| | Silver in sacks | 1,450 | 00 |
| | Do. in box | 125 | 50 |
| 6637 | T. G. Brown (note) | 140 | 00 |
| 5914 | C. H. Winsor (R. E. M., Canton) | 1,000 | 00 |

| | | | |
|---|---|---|---|
| 6008 | Margaret Reed, R. | 245 00 | |
| 6009 | Do. do. E. | 245 00 | |
| 6010 | Do. do. M. | 245 00 | |
| 6013 | Ole Larson | 200 00 | |
| 6014 | Do. do. | 200 00 | |
| 6015 | Do. do. R. | 200 00 | |
| 6016 | Do. do. E. | 200 00 | |
| 6017 | Do. do. M. | 200 00 | |
| 6018 | Do. do. | 200 00 | |
| 6709 | Isaac & Bell Clemmens, R. E. mo. | 325 00 | |
| 6710 | Do. do. do. | 325 00 | |
| 5985 | John Rudd (chat.) | 300 00 | |
| 6720 | J. B. Cloudas & W. (R. E. M.) | 400 00 | |
| 6729 | P. P. Peck (120 shares Temple stock) | 3,000 00 | |
| 6735 | P. P. Peck & A. H. Peck (same sec.) | 2,000 00 | |
| 6648 | H. A. Foster (chat. & R. E. M., 2d) | 664 83 | |
| 6140 | A. F. & Alfred Larson, R. E. | 662 00 | |
| 6591 | A. F. Davenport | 100 00 | |
| 6707 | Edward Ellis | 200 00 | |
| 6724 | H. C. Aldrich | 100 00 | |
| 6511 | Henry Callender & O. P. Weston | 3,159 56 | |
| 6566 | John Lascha | 70 32 | |
| 6223 | A. Boyington (R. E.) | 800 00 | |
| 5639 | S. D. Alguin (chat.) | 85 00 | |
| 6592 | E. W. Caldwell | 100 00 | |
| 5752 | Ammon Johnson | 300 00 | |
| 6225 | John McKee | 1,000 00 | |
| 5594 | Albert Reynolds | 100 00 | |
| 6032 | Edward Stone | 199 00 | |
| 6681 | Sioux Falls university | 100 00 | |
| 6565 | M. B. Spencer (sheriff's cert.) | 120 00 | |
| | 150 shares Dakota Cattle Co.'s stock | 6,000 00 | |
| | | 27,541 21 | |
| | | | 27,541 21 |

(Endorsed:) Supreme court of the Territory of Dakota. Filed Sep. 27, 1888. J. H. C. Young, clerk.

42 TERRITORY OF DAKOTA, } ss:
*Minnehaha County,* }

In District Court, 4th Judicial District.

THE SIOUX FALLS NATIONAL BANK, Pl'ff,
*vs.*
THE FIRST NATIONAL BANK OF SIOUX FALLS, Def't.

Application having been made by the defendant above named for an order upon the above-named plaintiff to show cause why the attachment issued in the above-entitled action against the property of the defendant on the first day of March, 1886, should not be set

aside, vacated, and discharged upon the grounds and for the cause hereinafter stated, to wit:

First. That the first ground of attachment stated in the plaintiff's affidavit for attachment is not one of the grounds contained in and required to be stated by the statute.

Second. That said ground is one of the same grounds stated in the plaintiff's affidavit in support of and upon which was granted a previous writ of attachment in this action against the defendant, and was passed upon and adjudged insufficient and no ground of attachment by this court on the 27th of February, 1886.

Third. That the allegations of said affidavit that the defendant is a foreign corporation are wholly disproven by the other allegations thereof, which show that it is not a foreign, but a resident and domestic corporation.

Fourth. The defendant, being a national bank located at Sioux Falls, Minnehaha county, in this Territory, is not a for-
43 eign corporation within the meaning of sections 197 and 199 of the Code of Civil Procedure.

Fifth. That the second alleged ground of attachment in said affidavit set forth is not one of the grounds of attachment enumerated in the statute and required to be stated in the affidavit.

Sixth. Said allegation is untrue in every particular.

Seventh. The allegation of said affidavit "that this deponent verily believes and charges the truth to be that the said defendant has assigned and disposed of or is about to assign and dispose of its property with intent to defraud its creditors, and especially the plaintiff herein," either standing by itself or coupled with the succeeding allegations of the affidavit, are insufficient to warrant the issuance of an attachment:

(1.) Because the allegation quoted is stated only upon the belief of the affiant.

(2.) Because all the material portions of the succeeding allegations are stated either upon the belief or upon the information and belief of the affiant, and nowhere does it appear what were the sources of the affiant's information or upon what grounds his belief was founded.

(3.) Because said allegations and the alleged cause for attachment there stated are wholly false.

(4.) Because the said allegations taken as a whole do not state any ground of attachment, even though positively sworn to.

44 Eighth. The second alleged cause or ground of attachment in said affidavit stated is one of the same grounds contained and fully set forth in said plaintiff's previous affidavit for attachment above referred to and was passed upon and adjudged insufficient and no ground of attachment by the court in this action on the 27th day of February, 1886.

Ninth. The affidavit made and upon which the warrant was issued does not state any facts required by the statute to be stated to confer jurisdiction to issue the same.

Tenth. None of the facts enumerated in the statute as a necessary basis for the issuance of the writ are stated in the affidavit.

Eleventh. The warrant was otherwise improvidently and irregularly issued.

Twelfth. The affidavit for attachment in effect discloses that defendant is a domestic corporation and the property of such corporation is not attachable.

Thirteenth. The affidavit is insufficient in that it does not contain any statement of the venue or of the place where made.

Fourteenth. The warrant of attachment is not issued under the seal of the court.

And it appearing from the attachment, affidavit aforesaid upon which said warrant was issued, and all the proceedings upon said attachment, as well as from the affidavits of R. J. Wells, W. F. Furbeck, & E. A. Sherman, presented upon said application, and the orders and proceedings had upon said previous attachment,
45 that the defendant is entitled to said order to show cause, and that good grounds and reasons appear why the date hereinafter named should be fixed as the return day thereof:

Now, on motion of Mess. Wilkes & Wells and Boyce, Noyes & Boyce, attorneys for said defendant, it is ordered that said plaintiff show cause on the 4th day of March, 1886, at five o'clock of that day, in the afternoon, before the district court aforesaid, at Canton, in the county of Lincoln, in said Territory, why said attachment issued in the above-entitled action on the first day of March, 1886, should not be set aside, vacated, and discharged.

And it is further ordered that copies of the said affidavit of R. J. Wells, W. F. Furbeck, & E. A. Sherman, as well as of the order of the court entered on the 27th day of February, 1886, be served with this order.

Done at Canton, in said 4th judicial district, on this 2nd day of March, 1886, in open court.

By the court:

C. S. PALMER, *Judge.*

(Endorsed:) Supreme court of the Territory of Dakota. Filed Sep. 27, 1888. J. H. C. Young, clerk.

46 TERRITORY OF DAKOTA, }
*Minnehaha County.* }

In District Court, Fourth Judicial District.

THE SIOUX FALLS NATIONAL BANK, Pl'ff, }
*vs.*
THE FIRST NATIONAL BANK OF SIOUX FALLS, Def't. }

The order on the plaintiff to show cause why the attachment issued in the above-entitled action on March 1st, 1886, should not be set aside, vacated, and discharged came on to be heard before the court at Canton, in said fourth judicial district, in open court, on the 4th day of March, 1886, at five o'clock in the afternoon. Messrs. Wilkes & Wells & Boyce, Noyes & Boyce appeared for the defend-

ant herein, and Mess. Keith & Young & C. H. Winsor, Esq., for the plaintiff.

After hearing of counsel, it is ordered by the court that the hearing on this order to show cause be, and the same is hereby, continued until Monday, the eighth day of March, 1886, then to be heard at the court-room, in Sioux Falls, Minnehaha county, at 2 o'clock p. m. of that day.

By the court:

C. S. PALMER, *Judge.*

Done at Canton, in said district, M'ch 4, 1886.

To which order as hereinabove entered the defendant duly excepted.

C. S. PALMER, *Judge.*

(Endorsed:) Sioux Falls Naty. Bank *vs.* First National Bank. Order continuing hearing of motion. Filed March 9th, 1886. Cyrus Walts, clerk. Supreme court of the Territory of Dakota. Filed Sep. 27, 1888. J. H. C. Young, clerk.

47 TERRITORY OF DAKOTA, }
*Minnehaha County.* }

District Court, 4th Judicial District.

SIOUX FALLS NATIONAL BANK
*ag'st*
THE FIRST NATIONAL BANK OF SIOUX FALLS. }

This motion having come on for argument before the Hon. Bartlett Tripp, judge of this court, at the court-house, in the city of Sioux Falls, Minnehaha county, Dakota Territory, and after reading the affidavits of E. E. McKinney, C. L. Norton, N. E. Phillips, John McKee, C. K. Howard, D. R. Baily, H. L. Hollister, E. A. Sherman, S. M. Bear, A. Houser, and L. E. Young on the part of the pl'ff, and R. J. Wells, W. F. Furbeck, E. A. Sherman, G. E. Lathrop, H. L. Hollister, W. A. Wilkes, and a certified transcript of the proceedings of the board of county commissioners of Minnehaha county on the part of the def't, and after hearing Boyce, Noyes & Boyce and Wilkes & Wells, att'ys for def't, in support of said motion, and after hearing Keith and Young & C. H. Winsor, of counsel for pl'ff—

Ordered that the motion herein on the part of the defendant to dissolve the attachment herein be, and the same hereby is, denied, and the attachment sustained, with $10 costs, to be paid by the defendant to the plaintiff herein.

Done at Sioux Falls, in the 4th judicial district, this 9th day of March, 1886.

By the court:

BARTLETT TRIPP, *Judge.*

To which ruling of the court the defendant, by its counsel,
48 duly excepted then & there, & such exception is now settled & allowed.

March 9, 1886.

BARTLETT TRIPP, *Judge.*

(Endorsed:) District court, Minnehaha county. Sioux Falls National Bank against The First National Bank of Sioux Falls. Order. We admit due and personal service of the within order upon us made at Sioux Falls, D. T., on this 9th day of March, 1886. Wilkes & Wells, attorneys for def't. Filed March 10th, 1886. Cyrus Walts, clerk. Supreme court of the Territory of Dakota. Filed Sep. 27, 1888. J. H. C. Young, clerk.

49 TERRITORY OF DAKOTA, }
*County of Minnehaha.* }

District Court, 4th Judicial District.

SIOUX FALLS NATIONAL BANK, Plaintiff,
*vs.*
THE FIRST NATIONAL BANK OF SIOUX FALLS, Defendant.

On reading and filing the affidavits of R. J. Wells and C. A. Greeley and the notice of motion to change the place of trial of this action from said Minnehaha county to some other county in said judicial district, and after hearing W. A. Wilkes, of counsel for defendant, and H. H. Keith, of counsel for plaintiff—

Ordered that the place of trial of this action be, and hereby is, changed from the county of Minnehaha to the county of Moody, to be tried at the January term of said court, commencing January 4th, 1887.

Dated at Sioux Falls, in said 4th judicial district, Dakota Territory, this 7th day of December, 1886.

By the court:

C. S. PALMER, *Judge.*

I hereby certify that the foregoing order is a true and correct copy of an order this day filed with me as clerk of this court.

CYRUS WALTS,
[SEAL.] *Clerk of the District Court in & for Minnehaha County, D. T.*

(Endorsed:) Supreme court of the Territory of Dakota. Filed Sep. 27, 1888. J. H. C. Young, clerk district court, Minnehaha county. Sioux Falls National Bank against The First National Bank of Sioux Falls. Certified copy — order. Filed at — o'clock — m. on Dec. 9, 1886. James Wilson, clerk of the district court, Moody county, Dakota.

50 TERRITORY OF DAKOTA, }
*Minnehaha County.* }

In District Court, 4th Judicial District.

SIOUX FALLS NATIONAL BANK
*ag'st*
THE FIRST NATIONAL BANK OF SIOUX FALLS.

The plaintiff for a complaint in this action complains of the de-

fendant and alleges the following facts constituting its cause of action:

I. That the plaintiff is & at all the time hereinafter stated was a banking association and corporation created by and under the laws of the United States known as and called by the name of "the national bank act," passed June 3d, 1864, and the several other acts of Congress of the United States amendatory of the act aforesaid, and located and transacting its said business as such national bank at Sioux Falls, in Minnehaha county, Territory of Dakota, under and by its aforesaid corporate name.

II. That the defendant is and at all the time hereinafter stated was a banking association and corporation created by and under the laws of the United States known as & called by the name of "the national bank act," passed June 3d, 1864, and the several other acts of Congress of the United States amendatory of the act aforesaid, and located and transacting its said business as such national bank at Sioux Falls, in Minnehaha county, Territory of Dakota, under and by its aforesaid corporate name.

III. That on the 12th day of January, 1886, at the city of Sioux Falls, Minnehaha county, Territory of Dakota, the said defendant, by W. F. Furbeck, its cashier, for value received, made its
51 check in writing dated on that day and delivered the same to C. K. Howard; that the following is a copy of said check, to wit:

"SIOUX FALLS, DAK., *Jan'y* 12, 1886.

"No. 91. The First National Bank of Sioux Falls pay to the order of C. K. Howard, Co. treas., sixteen thousand five hundred seventy-one and $\frac{61}{100}$ dollars—$16,571.61.

(Signed) "W. F. FURBECK, *C's'r.*"

IV. That the said W. F. Furbeck is the cashier of defendant and duly issued said check for and in behalf of defendant, and that the words "cashier's check" are printed across the face of said check.

V. That the said C. K. Howard duly endorsed said check and wrote across the back thereof "C. K. Howard, county treasurer," and delivered the same so endorsed; and that thereafter, to wit, January 13th, 1886, it came lawfully into the possession of this plaintiff in the usual course of business for value, and that plaintiff is now the legal owner & holder of the same.

VI. That said check was duly presented to the said defendant for payment on the said 13th day of January, 1886, during banking hours and payment thereof was refused.

VII. That no part of the same has been paid.

Wherefore the plaintiff demands judgment against the defendant for the sum of sixteen thousand five hundred seventy-one and $\frac{61}{100}$ dollars, with interest thereon from Jan'y 13, 1886, besides the costs of this action.

KEITH AND YOUNG,
*Att'ys for Pl'ff.*

TERRITORY OF DAKOTA, } ss:
*County of Minnehaha,* }

52 Charles L. Norton, being duly sworn, says he is the cashier and an officer of the plaintiff in this action; that the annexed and foregoing complaint is true of his own knowledge except as to those matters therein stated on information and belief, and as to those matters he believes it to be true; that deponent makes this verification for and in behalf of the plaintiff, and that all material allegations in said complaint are within the personal knowledge of deponent.

CHARLES L. NORTON.

Subscribed and sworn to before me this 14th day of January, A. D. 1886.

SILAS E. BLAUVEL,
[SEAL.] *Notary Public, Minnehaha Co., Dakota Ter.*

(Endorsed:) The Sioux Falls National Bank against The First National Bank of Sioux Falls. Complaint. Supreme court of the Territory of Dakota. Filed Sep. 27, 1888. J. H. C. Young, clerk. Keith & Young, att'ys for plaintiff.

53 SIOUX FALLS NATIONAL BANK
*ag'st*
THE FIRST NATIONAL BANK OF SIOUX FALLS.

The Territory of Dakota sends greeting to the above-named defendant:

You are hereby summoned and required to answer the complaint of the above-named plaintiff, a copy of which is herewith served upon you, and to serve a copy of your answer upon the subscriber at their office, in the city of Sioux Falls, within thirty days after the service of this summons on you exclusive of the day of such service, and if you fail to answer this complaint within that time the plaintiff will take judgment against you for the sum of sixteen thousand five hundred seventy-one and $\frac{61}{100}$ dollars, with interest thereon from January 13th, 1886, besides the costs of this action.

Dated at Sioux Falls, D. T., this 14th day of January, A. D. 1886.

KEITH AND YOUNG,
*Plaintiff's Attorneys.*

(Endorsed:) Original. Territory of Dakota, Minnehaha county. In district court. Sioux Falls National Bank ag'st The First National Bank of Sioux Falls. Summons & complaint. Money demand. Complaint served. Keith & Young, plaintiff's attorneys, of Sioux Falls, D. T. Filed Jan. 15th, 1886. Cyrus Walts, clerk.

TERRITORY OF DAKOTA, } ss:
*County of Minnehaha,* }

I hereby certify that the within summons and complaint
51 came into my hands for service on the 14th day of January, A. D. 1886, and I have served the same on the within-named

defendant, The First National Bank of Sioux Falls, by delivering to and leaving with R. J. Wells, president of said First National Bank of Sioux Falls, personally, in said county and city of Sioux Falls, a true and attested copy of the within summons and complaint on this 14th day of January, A. D. 1886.

JOSEPH M. DICKSON,
*Sheriff of Minnehaha County, D. T.*

*Fees.*

| | |
|---|---|
| Service & return | 60 |
| Copy | 1 00 |
| Mileage | 20 |
| | $1 80 |

[Endorsed:] Supreme court of the Territory of Dakota. Filed Sep. 27, 1888. J. H. C. Young, clerk.

55 TERRITORY OF DAKOTA, } *ss:*
*County of Minnehaha,* }

In District Court, 4th Judicial District.

THE SIOUX FALLS NATIONAL BANK, Plaintiff,
*vs.*
THE FIRST NATIONAL BANK OF SIOUX FALLS, Defendant.

The defendant above named answers the complaint of the plaintiff and—

(1.) Admits the allegations contained in article 1 and 2 of said complaint; admits that on the 12th day of January, 1886, W. F. Furbeck, the cashier of defendant, made a check payable to the order of C. K. Howard, county treasurer, for the sum of $16,571.61; that a correct copy of said check is set forth in article 3 of plaintiff's complaint; that said check is endorsed across the face "cashier's check," as alleged, and that said check has not been paid by defendant.

And defendant denies each and every other allegation in said complaint contained except as hereinafter specifically admitted.

(2.) And defendant, denying that the check mentioned in the complaint came lawfully into the possession of plaintiff in the usual course of business, alleges that the acquisition or purchase of said check by plaintiff was an act *ultra vires* of said plaintiff and no action can be maintained by plaintiff thereon.

(3.) And, for a further defense, defendant alleges that the check described in the complaint was never absolutely delivered to the payee therein so as to become a valid obligation against de-
56 fendant, but was delivered conditionally and not otherwise, as hereinafter set forth; that the said C. K. Howard, as the county treasurer of the county of Minnehaha aforesaid, kept at the times hereinafter mentioned an account for and on behalf of said

county with defendant; that on the 12th day of January, 1886, the said C. K. Howard, as county treasurer, applied to the defendant for the sum of $16,571.61; that the credit to said Howard's account on the books of the bank was not at that time equal to the sum requested; that while the check set up in the complaint was issued it was not delivered as an obligation of the bank to C. K. Howard and the transaction was not complete; that while the said Howard took said check into his possession he did so upon the express condition that he would at once make further deposits with the bank; that his accounts should be made good for the amount of the check, and that the check should not be treated as delivered and operative and should not be by him disposed of, hypothecated, or put into circulation before said account was made good and consideration furnished for said check and said transaction fully completed; that said Howard's account was never made good to the amount of said check; that said Howard never gave his own check upon his deposit for the amount of said check nor did said Howard (the conditions of its delivery failing) return said check to defendant in pursuance of his agreement aforesaid. Defendant further alleges that the said Howard was at said time about having his January settlement as treasurer aforesaid with the board of county commissioners of Minnehaha county; that the said C. K. Howard produced said check, together with certain moneys, as defendant is informed and believes, before said commissioners on an accounting had with them concerning the county business,
57 and that thereupon the said commissioners wrongfully and illegally took from the possession of said Howard the said check and turned over the same to H. L. Hollister, C. G. Coats, and W. H. Corson; that said Hollister, Coats, and Corson and D. R. Bailey wrongfully and illegally received and took possession of said check and went with the same to the Dakota National Bank of Sioux Falls and offered the same for deposit; whereupon the said check was duly presented by Mr. George H. Brace, president of said bank, and said D. R. Bailey for payment at the bank of defendant, and payment was refused because said check was obtained without consideration and conditionally as aforesaid and was not a valid obligation of defendant; that thereupon the said Dakota National bank refused to receive said check upon deposit; whereupon, and some hours thereafter, as defendant is informed and believes, said Bailey, Coats, Hollister, and Corson took said check to the said plaintiff, which, with the full knowledge of the dishonor of said check, as defendant is informed and believes, took said check and credited the same to a new account with said bank in the name of said Hollister, Coats, and Corson; and defendant alleges on information and belief that plaintiff paid out no money on account of said check, but gave to said parties a bank pass book of account showing a credit for said check. Defendant further says that the plaintiff at once presented said check for payment to defendant and the defendant explained said matter of the issuance of the check to plaintiff and refused payment thereof and notified plaintiff that said check was not a valid obligation of defendant and requested plaintiff to de-

liver the same back again to said parties from whom the plaintiff received it, but plaintiff refused so to do, although at the same time admitting that no payment of money or otherwise had been made on account of said check.

58 Defendant further says that the said county commissioners were notified on the 13th day of January, 1886, of the facts herein set forth concerning the issuance of the check and of the fact that it was not a valid obligation of defendant several days before making their settlement and approval of the accounts of said C. K. Howard, county treasurer; that neither the said county commissioners nor the said H. L. Hollister, C. G. Coats, W. H. Corson, D. R. Bailey, nor either of them had at any time any property in, title to, or right to the possession of said check, and that the plaintiff took said check in bad faith with notice of this fact, and, further, that plaintiff took said check, as defendant is informed and believes, with notice of its dishonor and of the fact that it was not a valid obligation of defendant, and paid nothing for said check until after it had full knowledge of the facts concerning said check herein set forth and of the fraud practiced upon defendant in transferring it.

(4.) And, for a further defense, the defendant alleges that said C. K. Howard was at the dates hereinafter mentioned and for many years prior had been the county treasurer of Minnehaha county aforesaid, and was on said 12th day of January about having his official semi-annual accounting and settlement with the county commissioners of said county.

Defendant further says on *his* information and belief that said Howard was at said time in arrears in a large amount to said county and without sufficient funds to meet his obligations to said county; that when the said Howard received said check from said Furbeck he received the same conditionally, as hereinafter set forth,

59 and also received the same in his official capacity as treasurer of Minnehaha county and not otherwise; that the funds then to the credit of the said official account of Howard in defendant's bank were not equal to the amount of said check, and thereupon it was agreed by said Howard that he would at once bring in money enough and make a deposit so that said account should be good as against said check, and that the said check should not be put into circulation as an obligation of defendant until said transaction was fully completed; that said Howard neither then nor thereafter gave his check upon his said official account to cover the said Furbeck's check nor did he bring in moneys to make said account good as against said check, and obtained conditional possession of the same without any consideration whatsoever; that said Howard thereupon after obtaining said check took the same and presented it to the said board of county commissioners, but, as deponent is informed and believes, the said check was not then endorsed by said Howard, nor did said county commissioners then make any settlement with said Howard of his said official accounts or make any order that the said accounts were found to be correct, or that said Howard had produced before them moneys and vouchers to cover the funds to be chargeable to him as treasurer of said

county, and defendant charges the facts to be that before the making of any such settlement this defendant gave notice to said board of commissioners of defendant's intention to resist the collection of the said check; that defendant had a good defense thereto, and stated the grounds of such defense as aforesaid; and the defendant avers upon information and belief that at the date of said check J. B. Young, H. L. Hollister, Clark G. Coats, and W. H. Corson were and for many years prior thereto had been the sureties of said Howard upon his official bond as such treasurer of said county as aforesaid; that prior to the presentment of said
60 check to said board of county commissioners and on or about the same day the said Hollister, Coats, and Corson had applied to said board to be released from said bond and said application was refused, and the defendant upon information and belief avers that thereupon and at or about the said 12th day of January, 1886, and prior to the issuance of said check by the defendant said Hollister, Coats, and Corson, together with said Howard, unlawfully, wrongfully, and with the intention of cheating and defrauding said defendant out of the amount of said check, combined and conspired together to obtain from the defendant the amount of said check; that the said check was so obtained as aforesaid by said Howard in pursuance of said conspiracy and with such unlawful purpose as aforesaid of so cheating and defrauding said defendant as aforesaid and with the view to thus enable said Howard to make good his said default to said county; that the defendant at the time of the delivery of said check as aforesaid to said Howard was wholly ignorant of such conspiracy and combination and of such fraudulent and unlawful purpose and reposed in the confidence that said Howard was acting in good faith with defendant and that his representations and promises then made and the conditions aforesaid upon which said check was so delivered as aforesaid would be fulfilled and complied with in all things and was thereby deceived and induced to deliver said check to said Howard, and the defendant further upon information and belief avers that said sureties and said Howard, in furtherance of said conspiracy and to carry out and consummate the same and the fraud intended, induced and procured said board of county commissioners to aid in carrying out said conspiracy by unlawfully taking possession of said check and further unlawfully turning the same into the possession of the
61 said Hollister, Coats, and Corson, and, to further and more fully consummate said conspiracy and unlawful purpose, said check was endorsed in blank by said Howard so as to become in form negotiable, and said sureties, thus having the same unlawfully in their possession, to further consummate said conspiracy and unlawful purpose, endeavored to negotiate the same to an innocent purchaser, but, failing so to do, delivered the same to the plaintiff herein and deposited it to their own credit and not to the credit of said county, as by said board of county commissioners they were enjoined and required to do; and the defendant upon its information and belief further avers that the plaintiff, before and at the time of its receipt of said check, well knew and had full notice of

all the facts aforesaid, and that the check had already been dishonored, and with such knowledge unlawfully aided and abetted in the consummation of the conspiracy and unlawful purpose aforesaid; that the plaintiff, in pursuance of said conspiracy, presented said check to defendant for payment on the same day on which *they* received it from said sureties; that the plaintiff, though then informed by the defendant of all the facts concerning said check, refused to charge back said check to said depositors, as requested by defendant, but, on the contrary, on the following day commenced this action on said check, and defendant alleges that plaintiff had not, prior to the commencement of this action and prior to full notice of the facts concerning said check, paid any money or other valuable consideration whatever for said check.

And defendant further on information and belief alleges that for any apparent payment on said check made by plaintiff
62 after notice of the facts aforesaid said plaintiff is protected by the obligation or agreement of said sureties on said Howard's official bond.

Wherefore the defendant demands judgment for its costs in this action.

WILKES & WELLS &
BOYCE, NOYES & BOYCE,
*Defendant's Attorneys.*

(Endorsed:) Supreme court of the Territory of Dakota. Filed Sep. 27, 1888. J. H. C. Young, clerk.

63 TERRITORY OF DAKOTA, } ss.
*County of Minnehaha,* }

W. F. Furbeck, of said county, being duly sworn, says that he is the cashier of the defendant in this action, and that he has heard the foregoing complaint read and knows the contents thereof; that the same is true to deponent's own knowledge except as to those matters which are therein stated upon information and belief, and that as to those matters he believes it to be true, and *defendant* makes this verification on behalf of said defendant.

W. F. FURBECK.

Subscribed and sworn to before me this 10th day of March, 1886.

E. G. WRIGHT,
[SEAL.] *Notary Public, D. T.*

(Endorsed:) District court, fourth judicial district. County of Minnehaha. Sioux Falls National Bank *vs.* The First National Bank. Answer. Wilkes & Wells & Boyce, Noyes & Boyce, def'ts' att'ys. Supreme court of the territory of Dakota. Filed Sep. 27, 1888. J. H. C. Young, clerk. Territory of Dakota, fourth judicial district. The Sioux Falls National Bank *vs.* The First National Bank. Answer. Due service of the within answer is hereby admitted this 10th day of March, 1886. Keith & Young, att'ys for plaintiff. Wilkes & Wells & Boyce, Noyes & Boyce, def'ts' att'ys. Filed March 15th, 1886. Cyrus Walts, clerk.

61 TERRITORY OF DAKOTA, } *County of Minnehaha.* }

In District Court, Fourth Judicial District.

SIOUX FALLS NATIONAL BANK, Plaintiff,
*vs.*
THE FIRST NATIONAL BANK OF SIOUX FALLS, Defendant. }

The plaintiff, upon application of the defendant in this action, replying to the new matter alleged as a defense by way of avoidance in the defendant's answer to the complaint in this action, denies the same and each and every part thereof, except what is hereinafter admitted.

2. The plaintiff, replying to the new matter alleged as a defense by way of avoidance to the third defense contained in the answer of the defendant, denies the same and each and every part thereof, except as hereinafter admitted.

3. The plaintiff, replying to the new matter alleged as a defense by way of avoidance to the fourth defense contained in the answer of the defendant, denies the same and each and every part thereof, except what is hereinafter admitted.

4. The plaintiff admits that C. K. Howard has been for a number of years last past the county treasurer of Minnehaha county, and was such treasurer on the 12th day of January, 1886; and further admits that on or about said date said treasurer had his semi-annual accounting and settlement of his accounts with said county up to January 1st, 1886; and also admits that prior to said date the said Howard, as such county treasurer, kept an account with the defendant.

Wherefore this plaintiff demands judgment as in the complaint in this action demanded.

KEITH AND YOUNG,
*Pl'f's Att'ys.*

65 TERRITORY OF DAKOTA, } *County of Minnehaha,* } *ss.*

C. E. McKinney, being duly sworn, says he is the president of the plaintiff in this action; that the annexed and foregoing reply is true of his own knowledge except as to matters therein stated on information and belief, and as to those matters he believes it to be true, and deponent makes this verification on behalf of the plaintiff and is an officer of the plaintiff.

C. E. McKINNEY.

Sworn to before me this 12th day of March, A. D. 1886.

SILAS E. BLAUVELT,
[SEAL.] *Notary Public, Dakota.*

(Endorsed:) District court, Minnehaha county. Sioux Falls National Bank against The First National Bank of Sioux Falls. Reply. Keith & Young, attorneys for plaintiff, Sioux Falls, Dak.

We admit due and personal service of the within reply upon us made at Sioux Falls, D. T., on this 12th day of March, 1886, with the same effect as if ordered by the court. Wilkes & Wells & Boyce, Noyes & Boyce, attorneys for def't. Filed March 24th, 1886. Cyrus Walts, clerk. Supreme court of the Territory of Dakota. Filed Sep. 27, 1888. J. H. C. Young, clerk.

66 TERRITORY OF DAKOTA, } ss:
*County of Minnehaha,* }

In District Court, Fourth Judicial District.

THE SIOUX FALLS NATIONAL BANK, Plaintiff,
*vs.*
THE FIRST NATIONAL BANK OF SIOUX FALLS and J. LESLIE THOMPSON, as Receiver, etc., Defendants.

The above-named defendant, J. Leslie Thompson, by leave of the court, answering the complaint of the plaintiff—

1. Alleges that on the 11th day of March, A. D. 1886, he was, by the then acting Comptroller of the Currency of the United States, duly appointed as receiver of said First National Bank of Sioux Falls, and then and thereupon entered upon the duties of said office, and from thence hitherto has been and now is engaged in the performance of the duties of said office, and has charge of all the assets, books of account, and personal property of said bank.

2. Admits the allegations contained in paragraphs "one" and "two" of the complaint; admits that on the 12th day of January, 1886, W. F. Furbeck, the cashier of the defendant bank, made a check payable to the order of C. K. Howard, county treasurer, for the sum of sixteen thousand five hundred and seventy-one and $\frac{61}{100}$ dollars; that a correct copy of said check is set forth in article "3" of plaintiff's complaint; that said check is endorsed across the face "Cashier's check," as alleged, and that said check has not been paid by defendant, and defendant denies each and every other allegation in said complaint contained, except as hereinafter specifically admitted.

3. And defendant, denying that the check mentioned in the complaint came lawfully into the possession of the plaintiff
67 in the usual course of business, alleges that the acquisition or purchase of said check by plaintiff was an act *ultra vires* of said plaintiff, and no action can be maintained by plaintiff thereon.

4. And for a further defense upon his information and belief this defendant alleges that the check described in the complaint was never absolutely delivered to the payee therein so as to become a valid obligation against the defendant bank, but was delivered conditionally, as hereinafter set forth, and not otherwise; that the said C. K. Howard, as the county treasurer of Minnehaha county aforesaid, at the times hereinafter mentioned kept an account for and on behalf of said county with the defendant bank; that on the 12th day of January, 1886, the said C. K. Howard, as county treasurer,

applied to the defendant bank, for the sum of $16,571.61; that the credit of the said Howard's account on the books of the bank was not at that time equal to the sum requested; that while the check set up in the compiaint was issued it was not delivered as an obligation of the bank to C. K. Howard, and the transaction was not complete; that while the said Howard took said check in his possession he did so upon the express condition that he would at once make further deposits with the bank, that his account should be made good for the amount of the check, and that the check should not be treated as delivered and operative and should not be by him disposed of, hypothecated, or put into circulation before said account was made good and consideration furnished for said check and said transaction was fully completed; that said account was never made good to the amount of said check; that said Howard never gave his own check upon his deposit for the amount of said check, nor did said Howard (the condition of its delivery failing) return said
68 check to the defendant bank in pursuance of his agreement aforesaid.

Defendant upon his information and belief further alleges that the said Howard was at said time about having his January settlement as treasurer aforesaid with the board of county commissioners of Minnehaha county; that said C. K. Howard produced said check, together with certain moneys, as defendant is informed and believes, before said commissioners on an accounting had with them concerning the county business, and that thereupon said commissioners wrongfully and illegally took from the possession of said Howard the said check and turned the same over to H. L. Hollister, C. G. Coats, and W. H. Corson; that said Hollister, Coats, Corson, and one D. R. Bailey wrongfully and illegally received and took possession of said check and offered the same for deposit with the Dakota National Bank of Sioux Falls, whereupon one George H. Brace, president of said last-mentioned bank, and said D. R. Bailey duly presented said check for payment at the defendant bank, and payment was refused for the reason that said check was obtained without consideration and conditionally as aforesaid and was not a valid obligation of the defendant; that thereupon the said Dakota National bank refused to receive said check on deposit, whereupon, and some hours thereafter, as defendant is informed and believes, said Bailey, Coats, Hollister, and Corson offered said check to plaintiff for deposit, and the plaintiff, with the full knowledge of the dishonor of said check, as defendant is informed and believes, received the same and credited the amount thereof to a new account with said bank in the name of said Hollister, Coats, and Corson; and the defendant further alleges on information and belief that plaintiff paid out no money on account of said check, but gave to said last-named parties a bank pass book showing a credit
69 for the amount of said check; this defendant upon his information and belief further says that the plaintiff at once presented said check for payment to the defendant bank and the defendant bank explained the matter of the issuance of said check to plaintiff and refused payment thereof and notified plaintiff that

said check was not a valid obligation of defendant and requested plaintiff to deliver the same back again to the parties from whom plaintiff received it, but plaintiff refused so to do, although at the same time admitting that no payment of money or otherwise had been made on account of said check by plaintiff.

Defendant upon his information and belief further says that the said county commissioners were notified on the 13th day of January, 1886, of the facts herein set forth concerning the issuance of the check and of the fact that it was not a valid obligation of defendant several days before making their settlement and approval of account of said C. K. Howard, county treasurer; that neither the said county commissioners nor said H. L. Hollister, C. G. Coats, D. R. Bailey, nor either of them, had at any time any property in, title to, or right to the possession of said check, and that the plaintiff took said check in bad faith with notice of this fact.

And, further, that plaintiff took said check with notice of its dishonor, as defendant is informed and believes, and of the fact that it was not a valid obligation of defendant bank and paid nothing for or on account of said check until after it had full knowledge of all the facts concerning said check, as herein set forth, and of the fraud practiced upon the defendant bank in transferring it.

5. And for a further defense this defendant upon his information and belief alleges that said C. K. Howard was at the dates
70 hereinafter mentioned and for many years prior had been the county treasurer of Minnehaha county aforesaid, and was on the 12th day of January, 1886, about having his official semi-annual accounting and settlement with the county commissioners of said county. Defendant further says upon his information and belief that said Howard was at said time in arrears in a large amount to said county and without sufficient funds to meet his obligations to said county; that when the said Howard received the said check from said Furbeck, the then cashier of the defendant bank, he received the same conditionally, as hereinafter set forth, and also received the same in his official capacity as treasurer of Minnehaha county and not otherwise; that the funds then to the credit of the official account of said Howard in defendant's bank were not equal to the amount of said check, and thereupon it was agreed by said Howard that he would at once deposit money enough to his said account as county treasurer to make the said account good as against said check, and that the said check should not be put in circulation as an obligation of the defendant bank until said transaction was fully completed by making said deposit; that said Howard neither then nor thereafter gave his check upon said official account for the amount of said Furbeck's check, nor did he deposit moneys to make said account good as against said check, and obtained conditional possession thereof without any consideration whatever; that said Howard thereupon, after obtaining said check, presented it to the board of county commissioners, but, as this defendant is informed and believes, did not then endorse the same, nor did said county commissioners then make any settlement with

said Howard of his official accounts or make any order that
71 said accounts were found to be correct or that said Howard had produced before them moneys and vouchers to cover the funds found to be charg-able to him as treasurer of said county; and this defendant upon his information and belief alleges that before any settlement of said account by said board of commissioners the defendant bank gave notice to said board of commissioners of said defendant's intention to resist the collection of said check, and that defendant bank has a good defense thereto and stated the grounds of said defense as aforesaid; and the defendant avers upon information and belief that at the date of said check one J. B. Young and the said H. L. Hollister, Clark G. Coats, and W. H. Corson hereinbefore mentioned were and for many years prior thereto had been the sureties of said Howard upon his official bond as treasurer of said county aforesaid; that prior to the presenting of said check to the board of commissioners and on or about the same day the said Hollister, Coats, and Corson applied to said board of commissioners to be released from said bond and said application was refused; and this defendant upon information and belief avers that thereupon and at or about the 12th day of January, 1886, and prior to the issuance of said check by the defendant bank said Hollister, Coats, and Corson, together with said Howard, unlawfully, wrongfully, and with the intention of cheating and defrauding the said defendant out of the amount of said check, combined and conspired together to obtain from the defendant the amount of said check; that the said check was so obtained as aforesaid by said Howard in pursuance of said conspiracy and with such unlawful purpose as aforesaid of so cheating — defrauding said defendant as aforesaid, and with the view to thus enable said Howard to make good his said default to said county; and this defendant further alleges upon his information and belief that the defendant bank, at the
72 time of the delivery of said check so as aforesaid to said Howard, was wholly ignorant of said conspiracy and combination and of said fraudulent and unlawful purpose and reposed in the confidence that said Howard was acting in good faith with defendant, and that his representations and promises then made and the conditions aforesaid, upon which said check was so delivered as aforesaid, would be fulfilled and complied with in all respects, and was thereby deceived and induced to deliver said check to said Howard, and this defendant further upon information and belief avers that said sureties and said Howard, in furtherance of said conspiracy, and to carry out and consum-ate the same and the fraud intended, induced and procured said board of county commissioners to aid in carrying out said conspiracy by unlawfully taking possession of said check and further unlawfully delivering the same into the possession of said Hollister, Coats, and Corson, and to further and more fully consum-ate said conspiracy and unlawful purpose said check was endorsed in blank by said Howard, so as to become in form negotiable, and said sureties thus having the same unlawfully in their possession, further to consummate said conspiracy and unlawful purpose, endeavored to negotiate said check to an in-

nocent purchaser, but, failing so to do, delivered the same to the plaintiff herein and deposited it to their own credit and not to the credit of said county, as by said board of commissioners they were enjoined and required to do; and the defendant upon his information and belief further avers that the plaintiff before and at the time of its receipt of said check well knew and had full notice of all the facts aforesaid, and that the check had already been dishonored, and with such knowledge unlawfully aided and abetted in the consummation of the conspiracy and unlawful purpose aforesaid;
73 and this defendant upon his information and belief further avers that plaintiff, in pursuance of said conspiracy, presented said check to defendant bank on the same day on which it received the same from said sureties; that the plaintiff, though then informed by the defendant bank of all the facts concerning said check, refused to charge said check back to said depositors, as requested by the defendant bank, but, on the contrary, on the following day commenced this action on said check. This defendant upon his information and belief alleges that plaintiff had not, prior to the commencement of this action and prior to full notice of the facts concerning said check, paid any money or other valuable consideration whatever for said check; and this defendant further on information and belief alleges that for any apparent payment on said check made by plaintiff after notice of the facts aforesaid said plaintiff is protected by the obligation or agreement of said sureties on said Howard's official bond. Wherefore the defendant demands judgment for his costs in this action.

T. B. McMARTIN,
*Att'y for Receiver.*

TERRITORY OF DAKOTA, } ss:
*County of Minnehaha,* }

Personally appeared J. Leslie Thompson, who, being first duly sworn, doth depose and say that he is defendant in the above-entitled action; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge except as to matters therein stated on information and belief, and that as to those matters he believes it to be true.

J. LESLIE THOMPSON, *Receiver.*

Subscribed and sworn to before me this 11 day of April,
74 A. D. 1887.

CHAS. L. BROCKWAY,
[SEAL.] *Notary Public, Dakota.*

(Endorsed:) District court, Minnehaha county. Sioux Falls National Bank against First National Bank. Answer of J. L. Thompson, receiver. Due service of the within admitted this 11th day of April, A. D. 1887. H. H. Keith, attorney for pl'ff. T. B. McMartin, attorney for —— ——, Sioux Falls, Dak. Filed June 9th, 1887. Cyrus Walts, clerk. Supreme court of the Territory of Dakota. Filed Sept. 27, 1888. J. H. C. Young, clerk.

75 TERRITORY OF DAKOTA, } ss:
*County of Minnehaha,* }

In District Court, Fourth Judicial District.

SIOUX FALLS NATIONAL BANK, Plaintiff,
*vs.*
FIRST NATIONAL BANK OF SIOUX FALLS, Defendant.

Take notice that on the annexed petition and on the pleadings in said cause I shall move the court, at chambers, in the court-house, in the city of Sioux Falls, on the thirty-first day of December, 1886, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order directing said action in petition mentioned heretobefore pending in this court between said parties, now pending in Moody county, said district, by change of venue, to be continued in the name of J. Leslie Thompson, as receiver of First National Bank of Sioux Falls, defendant in the place and stead of First National Bank of Sioux Falls, above named, and granting the said Leslie Thompson, receiver as aforesaid, leave to file amended and substituted answer, as he shall be advised, and for such other and further relief as the court may deem just.

Dated Sioux Falls, December 28th, 1886.

T. B. McMARTIN,
*Attorney for J. Leslie Thompson,*
*Receiver of First National Bank.*

To Messrs. H. H. Keith, attorney for plaintiff, and Wilkes & Wells & Boyce, Noyes & Boyce, attorneys for defendants.

(Endorsed:) Supreme court of the Territory of Dakota. Filed Sept. 27, 1888. J. H. C. Young, clerk.

76 TERRITORY OF DAKOTA, } ss:
*County of Minnehaha,* }

In the District Court, Fourth Judicial District.

SIOUX FALLS NATIONAL BANK, Plaintiff,
*vs.*
FIRST NATIONAL BANK OF SIOUX FALLS, Defendant.

To the district court of the fourth judicial district:

The petition of J. Leslie Thompson respectfully shows to the court—

I. That on or about the 12th day of January, 1886, the plaintiff above named commenced an action in this court against said defendant to recover the sum of $16,571.60 and interest by reason of the issuing of a certain pretended cashier's check, bearing date January, 1886, for said amount by said defendant to one C. K. Howard, and endorsed by said Howard to said plaintiff.

II. That after the commencement of said action, to wit, on the 11th day of March, your petitioner was appointed by the Comptroller of the Currency of the United States receiver of said First

National Bank, defendant, as more fully appears by copy of said appointment hereto attached and made a part hereof and marked Exhibit "A."

III. That thereupon your petitioner did, under and by the authority in him vested by law by act of Congress entitled "An act authorizing the appointment of receivers of national banks and for other purposes," *did* take possession of the books, records, and assets of the said defendant bank of every description and is now holding the same in performance of said trust.

IV. Your petitioner is informed by the Comptroller of the Currency of the United States that the issuing of said instru-
77 ment or cashier's check described in said complaint by one Warren F. Furbeck, the then cashier of said defendant bank, and the subsequent attachment issued in said action were the acts which rendered said bank insolvent.

That this petition is presented under the advice and control of the said Comptroller.

Wherefore your petitioner prays that he may be substituted as defendant in said action in the place and stead of said First National bank, and that said action may be continued in his name, and that he may be allowed sufficient time to prepare amended answer, and that he may have such other and further relief as the court may deem just.

Dated Sioux Falls, December 28th, 1886.

T. B. McMARTIN,
*Attorney for Receiver.*

(Endorsed:) Supreme court of the Territory of Dakota. Filed Sep. 27, 1888. J. H. C. Young, clerk.

78 2465 "A."

TREASURY DEPARTMENT,
OFFICE OF COMPTROLLER OF THE CURRENCY.

Whereas H. K. Taylor, a national bank examiner, duly authorized and directed by me to examine the affairs of "The First National Bank of Sioux Falls," located in the village of Sioux Falls, county of Minnehaha and Territory of Dakota, has, after due examination of its affairs, reported to me that the said bank is insolvent, and being satisfied that the said bank is insolvent and unable to pay its just and legal debts:

Now, therefore, I, Valentine P. Snyder, deputy and acting Comptroller of the Currency, in pursuance of the power and authority vested in me by law and under the provisions of section 1 of an act of Congress entitled "An act authorizing the appointment of receivers of national banks and for other purposes," approved June 30, 1876, do hereby appoint J. Leslie Thompson receiver of "The First National Bank of Sioux Falls," Dakota Ter., with all the powers, duties, and responsibilities given to or imposed upon a receiver under the provisions of the Revised Statutes of the United States which authorize the appointment of a receiver.

In witness whereof I have hereunto subscribed my name and caused my seal of office to be affixed to these presents, at [SEAL.] the city of Washington, in the District of Columbia, this 11th day of March, A. D. 1886.

V. P. SNYDER,
*Deputy and Acting Comptroller of the Currency.*

TERRITORY OF DAKOTA, } ss:
*County of Minnehaha,* }

79 Personally appeared J. Leslie Thompson, who, being first duly sworn, doth depose and say that he is petitioner in the above-entitled action; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge except as to matters therein stated on information and belief, and that as to those matters he believes it to be true.

J. LESLIE THOMPSON, *Rec'r.*

Subscribed and sworn to before me this 28th day of December, A. D. 1886.

CHAS. F. BROCKWAY,
[SEAL.] *Notary Public, Dakota.*

(Endorsed:) District court, Minnehaha county. Sioux Falls National Bank against First Nat'l Bank. Petition & motion. Due service of the within admitted this 29 day of December, A. D. 1886. H. H. Keith, attorney for pl't'ff. Wilkes & Wells, for First Nat. bank; Coughran & McMartin, attorney for ——, Sioux Falls, Dak. Filed Dec. 29th, 1886. Cyrus Walts, clerk. Supreme court of the Territory of Dakota. Filed Sep. 27, 1888. J. H. C. Young, clerk.

80 TERRITORY OF DAKOTA, } ss:
*County of Minnehaha,* }

In the District Court, Fourth Judicial District.

SIOUX FALLS NATIONAL BANK, Plaintiff,
*vs.*
THE FIRST NATIONAL BANK OF SIOUX FALLS, Defendant. } Order.

This cause coming on to be heard upon the motion, petition, and affidavit of J. Leslie Thompson, the now receiver of the said defendant bank, for an order for his substitution as party defendant, and the court after hearing T. B. McMartin in support of said petition and motion, and H. H. Keith, C. H. Winsor, Eddy & Davenport, and Messrs. Bailey & Davis in opposition thereto, and being fully advised in the premises, and that said petitioner's presence is necessary to a complete determination of the controversy, it is therefore ordered that J. Leslie Thompson, receiver of First National Bank, defendant, be made an additional party defendant, and that said petitioner have leave to amend the answer of said defendant in such other respects as he may be advised, and to serve a copy of such amended answer upon said plaintiff's attorneys within thirty days

from the date hereof, and that the cause thereupon proceed in like manner as if the said petitioner had originally been a party thereto.

Done at Sioux Falls this 18 day of January, A. D. 1887.

By the court:

C. S. PALMER, *Judge.*

To which said defendant then and there excepted, claiming the right absolute of substitution, which exception is hereby settled and allowed.

C. S. PALMER, *Judge.*

81 Plaintiff's counsel duly excepted to that portion of the above order making Thompson, receiver, a party to this action; also to that part of the order allowing an amended answer to be served in the case; which exceptions are allowed.

C. S. PALMER, *Judge.*

(Endorsed:) District court, Minnehaha county. Sioux Falls National Bank against First National Bank. Order to make party. Filed Jan. 26, 1887. Cyrus Walts, clerk. Filed at — o'clock — m. on June 13, 1887. James Wilson, clerk of the district court, Moody county, Dakota. Supreme court of the Territory of Dakota. Filed Sept. 27, 1888. J. H. C. Young, clerk.

82 TERRITORY OF DAKOTA, } ss.:
*County of Moody,* }

In District Court, Fourth Judicial District.

THE SIOUX FALLS NATIONAL BANK, Pl'ff, *ag't* }
THE FIRST NATIONAL BANK OF SIOUX FALLS and J. Leslie Thompson, as Receiver of the First National Bank, Def'ts. } Verdict for Plaintiff.

We, the jury, find the issues for the plaintiff and assess its damages at the sum of $18,247.14.

W. R. HYDE, *Foreman.*

(Endorsed:) Verdict. Filed at — o'clock — m. on Jun- 23, 1887. James Wilson, clerk of the district court, Moody county, Dakota. Supreme court of the Territory of Dakota. Filed Sep. 27, 1888. J. H. C. Young, clerk.

83 TERRITORY OF DAKOTA, } ss.:
*County of Moody,* }

In District Court, Fourth Judicial District.

SIOUX FALLS NATIONAL BANK
*vs.*
THE FIRST NATIONAL BANK OF SIOUX FALLS and J. LESLIE THOMPSON, Receiver.

This action coming regularly on for trial at the June term of the said Moody county district court before the Honorable James

Spencer, district judge, and a jury, and the jury having rendered a verdict for the plaintiff for the sum of eighteen thousand two hundred forty-seven & $\frac{14}{100}$ dollars ($18,247.14), and the same having been entered in the minutes of the court: Now, therefore, on motion of H. H. Keith and C. H. Winsor, attorneys for the plaintiff, it is adjudged that the said plaintiff have and recover of the said defendants the sum of eighteen thousand two hundred forty-seven & $\frac{14}{100}$ dollars ($18,247.14), damages, and one hundred & seventy $\frac{10}{100}$ dollars, costs and disbursements of said action.

Dated June 23d, 1887.

By the court:

JAMES SPENCER,
*Acting Judge 4th Judicial District, in Absence of Hon. C. S. Palmer, Presiding Judge.*

(Endorsed:) Supreme court of the Territory of Dakota. Filed Sep. 27, 1888. J. H. C. Young, clerk. District court, Moody county. Sioux Falls National Bank against The First National Bank of Sioux Falls & J. Leslie Thompson, as receiver, &c. Judgment. Filed at 10 o'clock a. m. on Jun- 29, 1887. James Wilson, clerk of the district court, Moody county, Dakota.

84 TERRITORY OF DAKOTA, } *County of Moody.* }

In District Court, Fourth Judicial District.

THE SIOUX FALLS NATIONAL BANK, Plaintiff, *vs.* THE FIRST NATIONAL BANK OF SIOUX FALLS and J. Leslie Thompson, as Receiver of the First National Bank of Sioux Falls, Defendants. } Bill of Exceptions.

Issue being joined, the above-entitled action came on for trial on the 21st day of June, 1887, at a regular term of the aforesaid district court held at the court-house, in the county of Moody, before the Hon. James Spencer, judge of said court, and a jury.

The jury having been called and sworn, *and* the plaintiff's counsel, having opened the case on behalf of the plaintiff, to maintain the issues on behalf of the plaintiff, offered and read in evidence the check mentioned in the complaint, which was marked Exhibit "A" and is as follows:

"No. 91. SIOUX FALLS, DAK., *Jan.* 12, 1886.

The First National Bank of Sioux Falls pay to the order of C. K. Howard, Co. treas., sixteen thousand five hundred seventy-one and $\frac{61}{100}$ dollars.

$16,571.61. W. F. FURBECK, *Cas.*"

Across the face of which was printed the words: "Cashier's check."

The following endorsement was on the back of the check: "C. K. Howard, county treasurer."

Plaintiff rests.

The defendants then opened the case on their part and, to maintain the issues on the part of the defendants, called as a witness

WARREN F. FURBECK, who, being duly sworn and examined
85 by Mr. WILKES, testified as follows:

My name is Warren F. Furbeck. I live in Oak Park, Cook county, Illinois. My business is banking; am manager of the bond department of the American Exchange National Bank of Chicago. In January, 1886, I was living in Sioux Falls; was cashier of the First National Bank of Sioux Falls. At that time R. J. Wells was president of the bank. I do not recall just the date of his election. I think it was some time in the latter part of November, 1885; that was not Mr. Wells' first connection with the bank. He was a member of the board of directors before that date. I cannot state positively how long he had been a member of the board of directors; possibly two years; maybe longer. Jackson B. Young was the former president of the bank, and Harry L. Hollister was the cashier of the bank prior to my being cashier. There had been a recent change in the management and stockholders of the bank about that time—November, 1885. Mr. Hollister and Mr. Young had both retired and disposed of their stock. It was puchased by some gentlemen in Chicago and a portion of it by myself; some of it by Mr. Wells. In January, 1886, the board of directors was composed of Mr. Kettlestrings, of Oak Park, Jacob Schaetzel, of Sioux Falls, Mr. Wells, and myself; the other members of the board was vacant. The capital stock of this bank was fifty thousand dollars (50,000.00). After Mr. Hollister ceased to be cashier he was vice-president of the bank until some time in November, 1885; am acquainted with C. K. Howard; have known him since some time in January, 1885. I know Mr. McKinney and Mr. Norton, the president and cashier of the Sioux Falls National bank, and knew them at that time—January, 1886. I know Mr. Brace, of the Dakota National bank, and Mr. Irvine, assistant cashier of that bank.

86 Mr. Howard was, I believe, county treasurer of Minnehaha county at that time, January, 1886. I remember quite distinctly the time and circumstance that Mr. Howard came into the First National bank and got the check in suit. He got it on the day that it bears date.

Q. Will you please state what time in the day that was that the check was delivered to him?

Ans. About half past four in the afternoon. It was after banking hours. I delivered the check to Mr. Howard.

Ques. Did Mr. Howard make any payment for the check when he got it or give any consideration for the same?

PLAINTIFF'S COUNSEL: Objected to as leading, incompetent, and immaterial. Plaintiff is not shown to have any knowledge of what occurred between these parties.

COURT: The objection is sustained unless you connect the plaintiff with it. This form of the question is objectionable.

Plaintiff's counsel objected to the form of the question; and, further, that if the check was issued, as stated by counsel, then it was a fraud upon the part of the bank and they are estopped from denying that it was issued without consideration to anybody.

COURT: The form of the question is leading. It is admitted, subject to be stricken out.

Ans. We did not receive any money; we simply received a promise of money. When Mr. Howard asked for the check he said that he would, within twenty minutes, bring in money enough to make a deposit. He said he would return the check within twenty
87 minutes and would not allow it to go out of his hands, and would make a deposit to his credit of a large amount of money besides. It was delivered to him on this condition, that he should not allow it to pass out of his hands.

Q. Did he return and make any deposit?

A. I did not see him again that evening.

Q. Did he return the check?

A. He did not.

Q. Did you charge up the amount of that check to Mr. Howard?

Plaintiff's counsel objected to this question as incompetent and immaterial. Objection sustained by the court. Defendants' counsel duly excepted.

Q. Did Mr. Howard give you any check on anybody or any account as consideration?

By the COURT: He has answered that substantially.

WITNESS: I next saw this check on the following morning when it was presented at the window for payment by Mr. Frank Irvine, of the Dakota National bank. I took the check from him and showed it to Mr. Wells, the president. Mr. Wells came forward to the counter and said, "We refuse to pay the check," and handed it back to him. I have been engaged in the banking business about twenty-five years—at Chicago for the most time, at Sioux Falls for a year or so.

Q. I want to ask you what is the custom prevalent among bankers as to the endorsement of checks when they are brought to the bank for deposit.

A. The invariable custom is for a depositor to endorse all paper that he puts into the bank to his account, in any bank that I have ever been connected with or any I have ever heard of.

88 Plaintiff's counsel moved to strike out the last question and answer on the grounds that the testimony is incompetent and immaterial.

The COURT: I will let it stand for the present, and if it becomes incompetent and immaterial it may be stricken out.

I was somewhat familiar with the banking business in Sioux Falls in January, 1886.

Q. As to the question whether a check of that amount—a check like that—was it a common occurrence to find such checks in the business of Sioux Falls banks?

Plaintiff's counsel objected to this question as incompetent, immaterial, irrelevant, and inadmissible. Objection sustained by the court. Defendants' counsel duly excepted.

Q. What action, if any, did the directors of the First National bank take with reference to the issuance of this check by you and as to your authority to issue the same?

Plaintiff's counsel objected to this question upon the ground that it is incompetent and inadmissible under the pleadings.

Q. Before or after the issuing of that check?

The COURT: I do not think it is at all material to show whether you had authority to issue checks, but you may show, if you wish, that there was not a meeting of the directors authorizing him to issue this particular check.

A. No action taken by the directors in regard to it.

Cross-examination by Mr. KEITH:

Witness shown the following writing, which is marked Exhibit "B:"

89 "FIRST NAT. BANK, SIOUX FALLS, DAK., *Jan'y* 12, 1886.

The books of the bank show a credit in favor of the county of $15,625.01. If you wish, you have the privilege of examining the books.

R. J. WELLS, *Pt.*
W. F. FURBECK, *Cas.*"

Defendant admits this to be a copy of the original made by the president and cashier of the First National bank and given to Mr. Howard.

Exhibit offered in evidence by plaintiff's counsel.

Defendants' counsel objects to the introduction of this statement for the reasons—

I. That it is wholly disconnected with the cause of action in suit.

II. It is a statement which, if made at all, was made prior to the issuance of this check without any authority of the bank and beyond the authority of the bank, and it is not a part of the *res gestæ* of this action, and has not been pleaded as being founded upon the check set forth in the complaint.

III. Being a straight action for the money represented by the check, this testimony, if available at all, is by way of estoppel on the part of the plaintiff, and the estoppel has not been pleaded and there is nothing to show that these representations contained in the statement were ever relied upon by the commissioners.

IV. That the issuance of this paper was *ultra vires* of the defendant bank.

V. That the commissioners to whom this letter appears to have been directed are not parties, by endorsement or otherwise, to this check.

90 VI. That the commissioners were placed in a legal sense where they had no authority or right to rely upon the authority of the letter or the check or the accounts, if any there were.

VII. That their dealings with the county treasurer in the settlement of his account only pertained to their right to count the moneys exhibited before them and other matters pertinent to count and consider, and they could not consider anything as money in the shape of letters, accounts, or checks.

Objection overruled. Defendants' counsel duly excepted.

The paper read to the jury.

Defendants' counsel moved to strike out the letter just read because it does not appear to have been addressed to any of the parties who are in contention over this suit, to the county commissioners of the county, or to C. K. Howard.

Motion overruled. Defendants' counsel duly excepted.

WITNESS: I think that letter or statement was given to Mr. Howard. I had no special reason for writing it; in fact, I did not write it myself, but Mr. Wells did.

Q. What did you sign it for?

Ans. It was a statement of the facts in the case.

Q. It was the facts, was it?

A. Yes, sir.

Q. Did the books show the county had that amount there?

A. They did.

Q. Was it true?

A. The books showed it.

Q. Was it true? Did the county have that amount there?

91 A. The books showed it.

Q. Was it true, Mr. Furbeck?

A. Well, under certain conditions it was; yes, sir.

Q. What conditions?

A. As a part of the funds that had been deposited to the credit of the county.

Q. At the time you wrote that letter, Mr. Furbeck, was it true that the county had 15,000 odd dollars to their credit in your bank?

A. Not subject to check.

Q. Was it true that there was that sum of money to their credit?

A. Certainly it was true; if it hadn't been true I should not have made that statement.

Mr. Howard was treasurer of Minnehaha county at this time. He kept his account as county treasurer at the First National bank. I was cashier only about a year, commencing in January, 1885. He kept his account there as county treasurer during the time that

I was cashier. He was making his settlement with the county commissioners in January, 1886, at the time that letter was written. He did not apply to me for the letter. I do not know whether he applied to Mr. Wells or not. I know that Mr. Wells wrote it. I do not think I wrote up his bank book. I do not know who did. I have not got his bank book. I do not know where it is. After I gave Mr. Howard that letter he went away and carried it with him; then he came back and said he wanted a certified check, I believe, and repeated it to Mr. Wells in my presence.

Q. Did he tell you about this settlement; that the county board were looking over his accounts and his bills had been checked up and that the amount called for was 27,000 odd dollars?

92 DEFENDANTS' COUNSEL: Objected to on the ground that it is simply heresay and moves to strike out.

Objection overruled. Defendants' counsel duly excepted.

A. I do not remember any such conversation like that—any such statement.

Q. Will you say there was none?

A. I could not swear there was none. I do not recollect. I think Mr. Howard wanted a certified check or the cash. I then issued to him this check in question.

Q. You knew what he wanted to do with it, did you not?

A. I thought I knew, but it appears I did not.

Q. What did you think he wanted to do with it?

A. I thought he wanted what he said. I thought he would take it as he agreed and return it inside of twenty minutes.

Q. Take it where.

A. To the county commissioners.

Q. For what purpose?

A. He did not tell me for what purpose.

Q. What did Mr. Howard say he wanted that check for?

A. I do not remember sufficient to testify about it.

Q. You remember of issuing the check?

A. Yes, sir.

Q. What did you issue it for?

A. I issued it because Mr. Howard requested it.

Q. Didn't Mr. Howard say he wanted that check to settle with the county board?

A. I could not swear that he did.

Q. Did he say that he did not?

A. I do not know that I could say that he did not.

93 Q. Did you have any conversation with Mr. Howard prior to the issuing of this check with reference to it?

A. No, sir; I had no conversation with him in regard to it.

Recalled and examined by Mr. WILKES:

—. Mr. Keith asked you this question: "Did you have any conversation with Mr. Howard prior to the issuing of this check with reference to it?" and you answered, "I had no conversation with

him in regard to it." I will ask you, Mr. Furbeck, whether by that question and answer you meant to include the time right at the time when you issued the check or whether it related merely to a previous conversation.

A. I meant to say by that that I had had no conversation whatever with Mr. Howard about issuing this identical check at any time—that is, prior to issuing it.

(Book shown witness.) This book is what is commonly called individual account book. It is not properly a book of record in a national bank, but is one of their account books. It was used at the time I was connected with the bank. I have turned to the account wherein is kept a record of the issuance of these cashier's checks similar to the one in suit. Part of it is in the handwriting of Mr. George Irvine, part of it by Mr. Kingsbury, part of it by myself, and a part of it by Mr. Nichols, who was book-keeper.

Q. I will ask you, Mr. Furbeck, if this cashier's check in suit was ever charged up to the account.

PLAINTIFF'S COUNSEL: Objected to as incompetent and immaterial. If the books of the bank were falsified or if they kept false books it is no evidence against the plaintiff in this suit.

Objection sustained.

94 Defendants' counsel duly excepted.

DEFENDANTS' COUNSEL: We offer to show by the books that there was no entry of this check made in the cashier's account; also whether it was the custom of the First National bank to issue these cashier's checks in lieu or instead of bank drafts for the purpose of exchange.

PLAINTIFF'S COUNSEL: Objected to as incompetent and immaterial and in nowise binding upon the plaintiff.

Objection sustained. Defendants' counsel duly excepted.

Defendants offer in evidence the book containing a record of the issuance of this cashier's check.

DEFENDANTS' COUNSEL: We offer to show the number of cashier's checks issued.

PLAINTIFF'S COUNSEL: We concede that 91 cashier's checks, including this one, have been issued, the first check bearing date February 3rd, 1884, and the last one January 12th, 1886—up to this number 91; also including March 1st, 1886, 92 issued.

COURT: The book is admitted in evidence.

Defendants now offer to introduce in evidence the stub of this check in suit, No. 91, and the record made thereon, and offer to show that this record was made on the 13th day of January, 1886, and before the plaintiff got the check in suit.

PLAINTIFF'S COUNSEL: Objected to as incompetent and immaterial. An endorsement made upon the stub of this check is not evidence in this case against the plaintiff.

COURT: Do you offer to show that the plaintiff had any knowledge of the writing on the stub?

95 DEFENDANTS' COUNSEL: For the purpose of showing the number of checks issued, and we want to read this memorandum upon the stub.

COURT: The objection is sustained and stub 91 is excluded.

Defendants' counsel duly excepted.

Q. I wish you to explain to the jury the answer that you gave yesterday to this question: "Was it true that there was that amount of money to the credit of the county?"

A. I think I meant to say that the statement that the books showed that there was this amount to the county's credit was true, the statement that the books showed it, but not that it was a fact that the money was there, but that the books showed it, and that is why I so stated it; the statement was true that the books showed it.

Cross-examined by Mr. KEITH:

—. Then you wish to change, Mr. Furbeck, the testimony that you gave yesterday in that regard?

A. No, sir; I do not wish to change it; I simply wish to explain it.

COURT: Will your explanation change it in any way?

A. No, sir; not as I understand it—that is, not change my mind any.

Mr. KEITH:

Q. Did you testify yesterday, Mr. Furbeck, that the county had 15,000 odd dollars to its credit in the First National bank when you made that statement?

A. I did not.

Q. You say that the books of the bank showed that the county had that credit there, did you not?

96 A. I say that the books showed it.

Q. Were your books false?

A. I do not think the books were false. If I could give my explanation that would show conclusively as to it.

Q. Who had charge of those books?

A. I do not know who had charge of them at that time.

Q. Did you?

A. No, sir; I did not.

Q. You was the cashier of the bank?

A. Yes, sir.

Q. You knew what was in the books, didn't you?

A. Yes, sir.

Q. You knew what was in those books yourself and that the county had this credit?

A. Yes, sir.

Q. Now you say the county did not have this credit?

A. I said they did not have it subject to check.

Q. I am not asking as to that.

A. I said that the books showed that the county had that credit.

The COURT: Was it true in fact that the county had the money there?

A. They did not have the money there; no, sir; not that they could take out.

EBEN M. HILLS, called and sworn in behalf of the defendant, was examined by Mr. WILKES and testified as follows:

I reside at Sioux Falls, D. T.; have lived there about 6 years; was cashier of the Citizens' bank from May, 1881, to November 15th, 1886, and since that time have been cashier of the Citizens' National Bank of Sioux Falls.

97 Q. What is the custom of bankers at Sioux Falls as to the disposition that is made by a bank of checks drawn upon other banks and deposited by a depositor of the bank, in case afterwards the check or presentment at the bank upon which it is drawn is dishonored—payment refused?

A. When a check or anything that is not cash, currency, or gold is deposited it is the custom to have the depositor endorse it, unless it is a check on our own bank. If when the paper is presented by the bank to the bank upon which it is drawn and payment is refused, it is customary, if it is in the same day's business and the amount has not passed upon the books of the depositor to his credit, to either charge it back to the depositor or change the deposit. If it is not in the same day's business and the item has gone to the depositor's credit we charge it back to him.

Q. What is done with the check then?

A. If the depositor drew a check to make it good we would give him this check. If he did not we would put the amount into his book and return it to him at the end of the month. It is customary to require an endorsement when a check is deposited. I am acquainted with C. K. Howard; he was county treasurer of Minnehaha county in January, 1886. I know Arthur Currey, who at that time, I think, was assistant cashier of the Sioux Falls National bank. On the evening of the 12th of January, 1886, at a railroad meeting in the court-house, in Sioux Falls, Currey and myself had a conversation concerniug a certain check issued by the cashier of the First National bank.

Q. Now, will you state, if you know, about the amount of the check and the conversation that took place and what Mr. Currey said, as near as you can?

98 WITNESS: Do you mean to say whether the amount of that check was stated in that conversation?

Q. Yes, sir.

A. I don't know that I could say that the amount of the check was stated; it was talked that the amount was large, and I presume, very likely, that the amount was stated, but I could not state from my recollection that it was stated.

It was stated that the commissioners were having a settlement with the county treasurer, Mr. Howard; that he was settling his accounts with the commissioners; that he had sent his usual bank book

there and the commissioners were not satisfied with it, and afterwards and finally they had sent up the check, and that it was issued with the expectation that it would come back as in former settlements; that money had been sent up in a pillow to the county treasurer's office and they had given a check and it hadn't come back and it was afloat, and that somebody else would probably get it away from the First National bank.

HARRY I. HOLLISTER, called and sworn in behalf of the defendant, was examined by Mr. MCMARTIN, and testified as follows:

I reside at Sioux Falls; have resided there ever since 1877. My business during that time has been banking and insurance; was engaged in banking up to two and a half or three years ago; was cashier of the First National Bank of Sioux Falls during that time. I am acquainted with C. K. Howard. He was county treasurer during that time. I was one of his bondsmen the last two terms that he served. I was in Sioux Falls in January, 1886, and was present at the meeting of the county commissioners at certain times during the January settlement. C. G. Coats, Mr. Corson, and J. B.
99 Young were the other bondsmen. The occasion of my visit there was that we had petitioned through our attorney, Mr. Bailey, to be released from the bonds of C. K. Howard, and petitioned the commissioners to take charge of the money and release the bondsmen. Mr. Bailey is one of the attorneys in this suit. Mr. Corson is now east somewhere; I don't know but in Chicago. I presume I made the acquaintance of Mr. Corson and Mr. Coates soon after coming to Sioux Falls; they were there at that time. The funds were turned over to me and the other bondsmen at that time by the commissioners. The funds consisted of checks, drafts, and money, gold and silver. There was probably seventeen or eighteen thousand of the twenty-seven thousand dollars in checks. (Check in suit shown witness.) I have seen that check. It was at the time the commissioners turned it over to the bondsmen. That was included and a part of the funds that I have testified to and that we receipted for. We received it on the 13th day of January; I should judge between one and two o'clock of that day.

Q. What did you do with it when you received it?

Plaintiff's counsel objected to this question as incompetent and immaterial.

DEFENDANTS' COUNSEL: We wish to show that the three bondsmen of C. K. Howard knew that Mr. Howard was behind in his accounts, and was, in fact, a defaulter for a number of years prior to this particular settlement; that Hollister, as cashier of the First National bank, had, at many of his settlements in January and July of each year, taken money or checks to the county commissioners at such settlement; that Mr. Hollister was no longer connected with the bank; that he really went upon the bond in
100 the first instance as a business plan in promoting the interests of his bank in getting the county deposits; that he expected the officers of the First National bank at this particular

time, referring to January, 1886, would follow their custom and present a check to the county commissioners, and that they would step in and ask the county commissioners to turn the funds over to them; that that was done; that this check was received as a part of the funds, and that they went by the particular bank upon which the check was drawn and offered it for deposit to a bank across the street known as the Dakota National bank; that the Dakota National bank refused to receive or give credit or purchase the check without the endorsement of the bondsmen; that the check was at their request sent to the First National bank for payment, and that payment was refused; that there was some talk about giving the Dakota National bank indemnity and an arrangement was partially entered into by which the Dakota National bank was to enforce payment against the First National bank, but, if unsuccessful, the bondsmen were to stand back of it in case of such liability; that after leaving the deposit in the Dakota National bank during the noon hour Mr. Hollister got word that afternoon from his attorney, Mr. Bailey, that C. E. McKinney, president of the Sioux Falls National bank, would in behalf of the bank take this check without liability to them (meaning the bondsmen); that they then went to the Dakota National bank and informed the president and cashier that they had received such word, and that if the Sioux Falls National bank did not take the check without endorsement that they would bring it back to the Dakota National bank; that they went
to the Sioux Falls National bank with this deposit by means
101 of an unusual route, back by the river, back of a lot of buildings, and entered the back door of the Sioux Falls National bank, and there, without saying a word regarding the endorsement of this check, the deposit was taken and every check, with the exception of this particular check, was endorsed by Mr. Hollister.

COURT: You may show that the bank took the other checks that were presented at that time with this check, and that they were endorsed.

The offer is denied with this exception.

Defendants' counsel duly excepted.

WITNESS: When this money was turned over to us the funds were in a little trunk and laid on the table, and I took hold of the lid of the trunk and carried it in and turned over the key and the trunk. I took the trunk down to the Dakota National bank and then went home. I saw the box containing the check and funds afterwards and offered to deposit it there at the Dakota National bank. I left the box with Mr. Brace when I went home to dinner and he set it in the safe. After dinner we went and got the box and took it down to the Sioux Falls National bank. Mr. Coates and Mr. Corson were with me at that time. There was no one else with us. We went out the back door of the Dakota National bank and into the back door of the Sioux Falls National bank. In the Sioux Falls National bank we met Mr. McKinney, president; Mr. Norton, cashier; Mr. Currey, assistant cashier, of the Sioux Falls National bank, and

Mr. Bailey; I think that was all. I had seen Mr. Bailey before and since dinner. I think it was between one and two o'clock in the afternoon when we went into the Sioux Falls National bank. I should think, probably, that we were in the bank ten or fifteen minutes; long enough to count the money. At the time we
102 were counting the money I think that Mr. Norton was in the front office; he may have been back and forth once or twice. Mr. McKinney and Mr. Curry assisted me in counting the money. After we counted the money they gave me a pass book for the bondsmen and I put it into my pocket and went home.

(Witness shown book.) That is the book that was given me at that time. (Book marked Exhibit "C").

I did not endorse that check and was not asked to endorse it. We were not in the bank-room, but in the back office. There were three rooms. In going into the back door there is a kind of a store-room, and the next door opens into the back private office, and the next room is the banking-room proper where the counter is. Nothing was said about endorsement there.

Q. Was there anything said about your having come from the Dakota National?

A. No, sir; I don't think there was. I had charge of the counting of the money and was busy with it. I do not remember of any one statement that was made there at that time. I should think there were six or seven checks included in that deposit. I do not know whether I was asked to endorse other checks or not. I endorsed them, however. The omission to endorse this check was not a mistake. We were not asked to endorse it.

Q. Well, why did you endorse the others and not endorse this one?

A. Well, I think that some of the others were some drafts on outside banks and some post-office orders.

Mr. McMartin: That hardly answers my question, Mr. Hollister.

Q. Why did you endorse the others and not endorse this check? Was it not a fact that it was an understanding they should take it without endorsement?

103 A. Mr. Bailey said——

Plaintiff's counsel objected as heresay.

Court: Conversation with Mr. Bailey unless the officers of the bank were present would not be competent.

Witness: Mr. Bailey was acting for us. His employment could not extend to this.

Q. Do you know of anything, Mr. Hollister, that was said in the bank-room of the Sioux Falls National bank that Mr. Bailey had been to see Mr. McKinney in regard to this deposit?

A. He told me so before we went down.

Q. Do you remember of anything being said by anybody present in the bank-room of the Sioux Falls National bank as to Bailey's being there before that time concerning this deposit?

A. Why, Bailey said——

Q. Anything said by anybody in the bank?

A. Not in the bank. Mr. Bailey did not go with us to the bank. He must have gone the front way. He was there or came in soon after, just about the time we did. I do not think he was in the bank when we came in. We left him at the Dakota National bank. I should think out of the whole number there was over two thousand dollars in checks and post-office orders and all that I endorsed. I think there were five or six of those instruments making up the two thousand dollars.

Q. Now, Mr. Hollister, what was the first thing that you said when you went into the back door of the Sioux Falls National bank?

A. Well, I presume I said something—"I have brought you a deposit" or "here it is," or something of the kind.

Q. Did you say "I have brought you the deposit"?

A. "I have brought you a deposit" or "the deposit," or
104 something of that kind. I cannot remember just what I did say. I referred, of course, to the county deposit. It was understood that it was not my deposit.

Q. Did you tell Mr. McKinney in that conversation that it was the county funds you were bringing?

A. Yes, sir; because the books showed that. It was written bondsmen; was very particular about that, because I did not want it put in any other shape only as the county. My remembrance is that after receiving this book that I have identified (marked Ex. "O") I went home. I did not send Mr. Bailey down there to the bank before I went. I was down there the next day. I saw Mr. McKinney the next day. We were talking together. I do not think there was any one else present. We had a conversation in which Mr. Corson and Mr. Bailey were present.

Q. What was the substance of that conversation?

PLAINTIFF'S COUNSEL: Objected to as incompetent and immaterial. Any declaration or statement made by Mr. McKinney or any of these persons one day after this occasion, as stated by the witness, is inadmissable as to the plaintiff and in no way binding; if it was not in the line of duty of Mr. McKinney or any other officer of the bank, then any statement made by them can in no was affect the plaintiff.

COURT: Objection sustained.

Defendants' counsel duly excepted.

WITNESS: I saw Mr. McKinney after that.

Defendants offer to show that Chas. E. McKinney, president of the Sioux Falls National bank, called for Mr. Hollister to come down and see him, and in that conversation wanted him to help
defray the expenses of this suit, and said, "I have helped
105 you out and you had better help me out."

Plaintiff's counsel objected.

COURT: Objection sustained.

Defendants' counsel duly excepted.

WITNESS: During my acquaintance with Mr. Howard, and especially during the time that I acted as his bondsman upon his official bond as county treasurer, I presume I knew as much about his business as he knew himself.

Plaintiff admits that this check was given on the 12th day of January, payment demanded on the 13th and refused, and this suit was commenced on the 14th.

Q. Was there any money drawn out by you or any of the bondsmen that day or the next or any change made in this account?

A. A credit. There is a small credit there. That was currency put in for deposit which was made. That is the only change made in the account. I stated that I saw Mr. McKinney the next day. I stated that I had a conversation, but I had no conversation with him the next day. Neither Mr. McKinney or any of the officers of the bank ever asked me to take the check back. Neither myself nor any of the bondsmen have ever been called upon to make the check good, to my knowledge.

Q. How many times, in your experience as a banker in the city of Sioux Falls, have you seen checks or have checks been presented to you—individual checks—of the amount of $16,000?

A. Coming to my knowledge now, I remember three or four in a period of seven or eight years.

Q. Did you, as a banker in a town or city, ever receive a check to the amount of $16,000 without endorsement by the party presenting it?

PLAINTIFF'S COUNSEL: Objected to as incompetent and immaterial.

106 COURT: Objection sustained.

Defendants' counsel duly excepted.

WITNESS: I am acquainted with C. L. Norton; have been acquainted with him since about the year 1879. He was formerly employed in the First National bank. It was at the organization of it. I think some year and a half or two years previous to the organization of the Sioux Falls National bank. From the First National bank he either went directly to the Sioux Falls National bank or to McKinney & Scougal's. The Sioux Falls National bank succeeded to the business of McKinney & Scougal. I did not employ Mr. Bailey to assist in making the deposit at the Sioux Falls National bank. I never had any communication at all from the Sioux Falls National bank in regard to our taking this deposit to them, and I sent nobody there. They did not send anybody to us, to my knowledge. I didn't talk with any one.

Q. Did you receive any communication from anybody regarding the making of this deposit at the Sioux Falls National bank? And, if so, please state who and the circumstances surrounding it.

Plaintiff's counsel objected as incompetent and immaterial and in no way binding upon this plaintiff.

COURT: State the facts whether you did or didn't, with whom, and when it was.

WITNESS: The communication was with Mr. Bailey.

Q. At what time?

A. When I returned from dinner; I presume between one and two o'clock.

Q. Where?

WITNESS: Near the Dakota National bank; I think, perhaps, in front of it, between the Cataract and the Dakota National bank—the Cataract house and the Dakota National bank.

107 Q. Now, how is the Dakota National bank located with reference to the Sioux Falls National bank?

A. Well, they were in the same block. The Dakota National bank is opposite the Cataract house, and the Sioux Falls National bank then, at that time, I should say, about four lots below. One is nearly at one corner and the other nearly at the other corner of the block. The Dakota National bank is the building next to the corner on 9th street, and the Sioux Falls National is the building next to the corner on 8th street; 8th street is north of 9th street.

Cross-examination by Mr. KEITH:

During all the time that we were in the Sioux Falls National bank Mr. Charles E. McKinney was engaged with me in counting the deposit we took down there. We emptied the bills out of the trunk on a desk that runs along against the wall on the side of the bank. We did not make it come out quite right at first and moved it onto a table that stood about five feet from that. We checked it over again and found the mistake. Myself, the other bondsmen, Mr. McKinney and Mr. Curry, were present at the table in counting this money. As soon as we had counted the money and made the deposit and had proper entries made the other bondsmen and myself went out of the bank.

Direct examination resumed by Mr. MCMARTIN:

Q. Did you ever have an account before in connection with Coats and Corson?

A. Did they have any account in the bank?

Q. Yes, sir

A. No, sir.

Defendants now offer in evidence and read to the jury bank's de-
posit book issued by the Sioux Falls National bank, Sioux
108 Falls, D. T., to H. L. Hollister, C. G. Coates, and W. H. Corson, bondsmen, which had been identified by witness and marked Exhibit "C," as follows, to wit:

(Cover:)

Sioux Falls National bank, Sioux Falls, Dakota, in account with H. L. Hollister, C. G. Coats, W. H. Corson, bondsmen.

(First page:)

Sioux Falls National bank, Sioux Falls, Dakota, in acc't with ——— ———, Dr.

| | | |
|---|---|---|
| Jan'y | 13 | $27,236 63 |
| | 13 | 430 00 |

JACOB SCHAETZEL, called and sworn in behalf of the defendants, was examined by Mr. MCMARTIN, and testified as follows:

I reside at Sioux Falls and have resided there between 11 and 12 years. My business during that time has been dealing in horses and real estate. I was a stockholder and director of the First National bank; have known Charles E. McKinney, president of the Sioux Falls National bank, about 6 or 7 years.

—. Did you have any conversation relative to a check issued—did you hear any conversation concerning a check of some $16,000 issued by the First National bank on or about the 13th day of January, 1886?

A. I had no conversation with Mr. McKinney relative to a check, but I heard a conversation of Mr. McKinney.

Q. When and where?

A. It was between half past 12 and 1 o'clock, at the Cataract house.

Q. Where is the Cataract house, Mr. Schaetzel?

109 A. Just on the corner of Phillips avenue and 9th street.

Q. Sioux Falls?

A. Yes, sir.

Q. Where is it with reference to the First National bank?

A. It is in the same—the First National is in the same building.

Q. Just explain its location to the jury.

A. The location of the bank is right in the corner, the southeast corner, of the building, and the office—it takes out a part of the office-room—the office extends right around the banking-room. The hotel office is an L shape and surrounds two sides of the bank. On the other two sides are Phillips avenue and 9th street.

Q. Now, as to the opening into the bank from the office, Mr. Schatezel.

A. There is an opening right from the west, from the west end of the office, into the bank-room; it is a door from the hotel office. When I speak of office I mean hotel office.

Q. What did Mr. McKinney say in that conversation, Mr. Schaetzel?

A. I came in from the back door—from the 9th-street entrance—what is called the ladies' entrance. As I came into the office I saw Mr. McKinney and Mr. Henry Corson, I think, and one other man was standing there, and I heard them talking about a check, and Mr. McKinney asked, "What is it; is this a straight cashier's check?"

and I think Mr. Corson, Henry, said, "Yes." He says, "I would like to have it; they would either pay it or close their doors."

Q. What time in the day was that?"

A. That was between half past 12 and 1 o'clock. Mr. McKinney was boarding at the Cataract house at that time.

110 There had not been any meeting of the board of directors concerning the issuing of this check.

Cross-examination by Mr. KEITH:

I had never had any trouble with the Sioux Falls National bank prior to this. A long time before that the Sioux Falls National bank had protested a note of mine. I had no trouble. I paid the note. I was angry about it, and said some pretty ugly things about Mr. McKinney and Mr. Norton; not as men, but as officers of the bank. I talked about it to different individuals in my office. I signed the bond for the First National bank for the release of the first attachment on the 14th day of January; it was the next day after this conversation I heard. I heard it on the 13th; it was on the 14th that I signed the bond. I had no conversation with Mr. McKinney myself. We were on speaking terms at that time and have always been.

Redirect examination by Mr. WILKES:

I was in the habit of going into the Cataract house nearly every day.

CLARK G. COATS, called and sworn in behalf of the defendants, was examined by Mr. MCMARTIN, and testified as follows:

I reside near Sioux Falls and have since the summer of 1869. My business since that time has been farming; have known C. K. Howard since the spring of 1870. (Witness shown check.) I think I have seen that check before. I saw it during the settlement with the treasurer—the last settlement. Howard was treasurer at that time. I never had any interest in the check. I think it was turned over to the bondsmen. They took it to the Dakota National bank after it was turned over to them. It was during this settlement—I think it was on the 14th of January—when this money was turned over and the check to the bondsmen, but am not

111 certain about the date. There was some currency also taken to the Dakota National bank. It was carried in a small tin box or trunk. It was left in the Dakota National bank. We afterwards carried it to the Sioux Falls National bank. I should judge about two o'clock in the afternoon. Mr. Hollister and Mr. Corson, my cobondsmen, were with me when we took it to the Dakota National bank. We went out of the back door of the Dakota National bank and into the back door of the Sioux Falls National bank, down the river bank. The back door led into a store-room. The next room was the office. I think there were two or three in the office of the Sioux Falls National bank when we were in there. This office joined the banking-room. It is back of it. I think Mr.

Charlie McKinney, Mr. Norton, the cashier, and Mr. Curry, assistant cashier, of the Sioux Falls National bank, were in the office while we were there. Mr. Hollister, Mr. Curry, and I think Mr. McKinney, counted the money there in the office while we were there. We staid there long enough to do the business, count the money, and make a deposit. Mr. Bailey was in that room that day. He didn't go there with us. I do not know as there was anything in particular talked about the check at that time; nothing more than it called for $16,000, and we were to have a deposit for $16,000, what the check called for. I did not endorse the check, to my knowledge. (Witness shown book.) I think we received this book at that time. I heard nothing said between the bondsmen and Mr. McKinney in regard to his taking this check to collect. I think Mr. Bailey, after this money had been counted, said to Mr. McKinney, "That is a pretty good sized check; you had better go and get your money on it." Mr. McKinney said he would collect it or see that the doors did not open the next morning. I think that was about the way. It might not have been worded just that way. I did not hear anything said about telegraphing the Comptroller or
112 about our coming from the Dakota National bank. I do not remember that anything was said about keeping still. I had no talk with the officers of the bank on the next day. I was at Keith & Young's office, over the Sioux Falls National bank, the next day. I think Mr. Hollister or Mr. Bailey asked me to go there. Mr. Keith said nothing to me while there, nor did Mr. Bailey in his presence. I think Mr. Bailey was acting for the bondsmen, but I am not certain. I had some talk with Mr. Bailey there. It was a double office, and Mr. Keith was in one part of the office and Mr. Bailey, Mr. Hollister, Mr. Corson, and myself were in the other part at times. Mr. Keith was not present with us and didn't take any part in this conversation nor was any of it addressed to him. I am not positive whether any of the officers of the bank were there; they were not with us in this room, nor was Mr. Young, Mr. Keith's partner, present during this conversation with Mr. Bailey and myself. The Sioux Falls National bank did not ask me to endorse the paper at the time of the deposit. There was a check given against this fund which I signed, I think on the morning of the 14th of January, but I am not certain as to the date; it was during this settlement with the county treasurer that the money was turned over to the new treasurer. I never signed but one check, to my knowledge.

Cross-examination by Mr. KEITH:

I did not endorse any of the checks that we deposited in the Sioux Falls National bank.

E. G. WRIGHT, called and sworn in behalf of the defendants and examined by Mr. ROYCE, testified as follows:

I reside in Sioux Falls, D. T. I am an attorney-at-law and real-estate broker. In January, 1886, I was district attorney of Minne-

haha county; was present in the court-house on the 12th
113 day of January at a settlement between the county commissioners and C. K. Howard. (Check shown witness.) I have seen this check before; I first saw it about four o'clock on the 12th day of January, 1886; it was in the hands of Mr. Howard. He laid it down on the table that was being occupied by the county commissioners. I did not see the check endorsed; it was not endorsed when it was first brought there. I didn't see it after it was endorsed that day. Mr. D. R. Bailey was present in the forenoon and afternoon and at the time this check was brought up by Mr. Howard. He was seated near the members of the county commissioners, and seemed to be acting in behalf of the bondsmen and of the county treasurer, C. K. Howard. I do not know that he did anything pertaining to the check. He presented a petition to the board of commissioners at that session and asked that the bondsmen—I think this was on the 12th. My impression is that the first petition was presented before any money had been brought in there—before the check came up. After the check came that day I think he drew up a resolution and handed it to a member of the county commissioners.

(Paper shown witness.)

Q. Look at this, Mr. Wright. It appears to be a copy of the proceedings of the board of county commissioners of the 13th of January, 1886. I call your attention to the second resolution appearing under these proceedings and will ask you whether or not that is the resolution Mr. Bailey presented.

A. This second resolution is the one that was written by Mr. Bailey and offered to the board by a member present—to the board by a member of the board.

Q. When was it he did that?

A. That day appears to be the 13th of January.

114 By the COURT: When was this resolution first presented by Mr. Bailey to the board?

A. My impression is it was presented on the evening of the 12th. I was at that time acquainted with Mr. Wilkes, one of the defendants' attorneys. I saw Mr. Wilkes in the commissioners' rooms; I should say between five and six o'clock of the evening of the 12th of January, 1886. When I had the conversation the board were in the room at the time. I had no conversation with him in the presence of the board—that is, before the board. I think the board had adjourned about five minutes before he came into the room. My recollection is that quite a number of the commissioners—a majority of them—were in the room. I had a conversation with him. Mr. Phillips, register of deeds, county clerk, and clerk of the board of commissioners was present during a part of this conversation. My recollection is that I was sitting at the side of the table of the county commissioners. Mr. Wilkes came in and called me out to one side of the room. I went back over to the window, and he wanted to know what had been done pertaining to the county settlement. He wanted to know if they had accepted of Howard's

settlement. My recollection is that I remarked to him that I was not keeping the records of the county commissioners, and that he would have to see Mr. Phillips, and he and I then went together and met Mr. Phillips, and he called Mr. Phillips out and there was some conversation then between Mr. Wilkes and Mr. Phillips and myself, but I cannot relate the exact conversation. My recollection is that I said to Mr. Wilkes, in reply to the question that he put to me as to what had taken place, that it was too late, or something; that there had been some action taken, but what it was I did not know; that Mr. Phillips kept the records of the business.
115 My recollection is that Mr. Wilkes said to me that the check that had come up there would be contested, or something of that kind. I do not pretend to give his language or my own at that time. I do not know what was done with the check that night.

Cross-examination by Mr. KEITH:

Q. Did you tell Mr. Wilkes on that occasion that you and the members of the board thought that check was the same as cash?

Defendants' counsel objected.

COURT: The objection is overruled.

Defendants' counsel duly excepted.

WITNESS: I cannot say whether I did or did not. My impression is that I did. The commissioners did not know anything about this conversation that I have referred to. I did not convey it to them or tell them what our conversation was.

SAMUEL T. CLOVER, called and sworn in behalf of the defendants and examined by Mr. MCMARTIN, testified as follows:

I reside in Sioux Falls. In January, 1886, I was publishing the Sioux Falls Leader; am acquainted with Arthur Curry. At that time I understand he was assistant cashier of the Sioux Falls National bank. On Friday morning, January 15th, I had a conversation with him concerning the issuance of a check for $16,000 issued by the First National Bank of Sioux Falls to C. K. Howard. Mr. Curry came down to my office on Friday forenoon, the 15th, and commenced a conversation by asking me if I had written up an article relative to the issuance of the bank check, or rather on the subject in relation to the bank check. I said that I had not; that I was investigating and trying to get the meat of the matter and wanted to give the facts as they stood. He then said that the Sioux Falls National bank had done a great deal for me, and now was a time for me to stand by them; it was a matter of vital im-
116 portance to them and emphasized that several times. I said I realized that, of course, but I could not give more than the facts in the case and I did not propose to. I was going to give the facts and that was all I could do. Then he commenced talking about the check. He said the bank had got the check and invited me down to look at it and I did later on. Then I asked him how he came by the check and how he got it and he proceeded to tell

how the bondsmen came down in company with Mr. Bailey to the office of the bank on Thursday—that is, the day previous—and Mr. Bailey acted for the bondsmen and they had got the check and he assured them it was all right. I remember of questioning him closely about it and he told me they were all right—any way, Mr. Bailey had assured him that they were all right—and they would either have to pay—the First National bank would have to pay—the check or they would bust the bank.

COURT: And so he took it?

WITNESS: Yes, sir. That is a pretty story. I kept a deposit in the Sioux Falls National bank at that time. I was always required to endorse paper. That was always a custom at that bank with me.

Cross-examination by Mr. WINSOR:

Q. You are not friendly with the officers of the Sioux Falls National bank, are you?

A. Indeed, I have the deepest kind of gratitude.

Q. You are very friendly?

A. Yes, sir.

Q. I call your attention particularly to the time when you were in my office some two or three weeks ago. In speaking of your being a witness in this case did you have a conversation with me in regard to that?

A. No, sir; not in regard to that—not before to-day.

117 Q. I will ask you if in that conversation you did not say when you got through with the Sioux Falls National bank—when your testimony was heard—that you would have paid them up for their work last fall. Did you or did you not make that statement?

A. It is very possible, but I cannot recall it.

Q. You do not say you didn't?

A. No; I do not deny anything. At the same time that would not effect my gratitude to them. I assure you I have the kindest respect for them all.

R. J. WELLS, called and sworn in behalf of the defendant, was examined by Mr. BOYCE, testified as follows:

I reside in Sioux Falls, D. T.; have lived there something over 8 years. I am an attorney. In January, 1886, I was president of the First National bank; was elected president in the fore part of December, 1885. Mr. Furbeck was cashier at the time I was president and Mr. Peck was assistant cashier after the 1st of January, 1886. (Check shown witness.) The first time I saw that check to see and to know what it was was in the forenoon of January 13th, 1886. I saw it as a piece of paper once before that. I saw C. K. Howard have it in the evening of January 12th in the First National bank. It was after banking hours. I am not certain as to the time of day, but think it was along towards night. Mr. Howard came into the office of the First National bank late in the afternoon or the even-

ing of the 12th of January, about the time I was going home, and wanted something to help him in his settlement with the county. At that time this check was given to him by the cashier upon his repeated assertions and promises that he would keep this in his own possession and deliver it to nobody, and that he would return
118 it within a short time—I think within twenty minutes—and that he would also at that time bring in a large amount of money that he had. He gave nothing for it and carried it off. He didn't give it back.

Q. State whether or not he drew any check—anything of that description—in favor of the bank.

Plaintiff's counsel objected on the ground as previously made to the same question to Mr. Furbeck; which objection was sustained by the court and defendants' counsel duly excepted.

WITNESS: The check was not charged to him in any way to my knowledge. My recollection is that Mr. Howard came into the bank through the back door from the Cataract house. The next occasion that I saw this check was about 10 o'clock in the forenoon of the 13th. Mr. Irvine, who was then employed in the Dakota National bank, came in with this check and presented it to the cashier, I think, and the cashier then called me to the cashier's window, and he then presented it for payment. I refused payment upon it and told him that I would not pay it. At that time the Sioux Falls National bank was located on the east side of Phillips avenue near the corner of 8th street. In the afternoon of the same day, the 13th, Mr. C. E. McKinney presented the same check. Payment was refused upon it at that time. That same afternoon Mr. C. L. Norton presented it also for payment, and it was refused again, and on the evening of that same day Mr. C. L. Norton, the cashier of the bank, called at my house and not finding me at home came up to Mr. Wilkes' and stated to us that there would be trouble on the morrow if we did not pay that check, and after considerable conversation we three went down to the Sioux Falls National bank and there met Mr. McKinney and Mr. Keith, one of plain-
119 tiff's attorneys. We said to Mr. Norton and Mr. McKinney in the presence of Mr. Keith that this check had been obtained from the First National bank without any consideration and had been fraudulently diverted from the purpose for which it was issued, and now they had better charge this check back to the party from whom they got it. They said they admitted they paid nothing for it, but that was not the way of doing things, and they proposed to make us pay it. We had a long conversation. After repeated urging for them to take it back, we strongly insisting that they should do so, Mr. Norton replied that they would not do that—they couldn't do it, and if we did not pay it they knew a way to make us pay it, and that mighty quick, too. Mr. McKinney also said that they would not charge it back and appealed to Mr. Keith, and I think Mr. Keith asserted as a legal proposition that they could not charge it back. Mr. Wilkes also stated the same thing to them and got substantially the same reply. Mr. Peck came down, I

think, while we were there and the conversation was carried on in that strain, and we went and got Mr. Furbeck, and it was then continued, we urging them to pursue the usual friendly course between banks and not to inaugurate a run, they insisting they wouldn't do it.

PLAINTIFF'S COUNSEL: That part of the witness' testimony I desire stricken out in regard to inaugurating a run.

WITNESS: I will state when Mr. Norton came up to the house he stated that there was going to be a run if it wasn't paid, and I found when I came down-town it had been started already.

Plaintiff's counsel asked to have this last part of the answer stricken out; which request was granted by the court, and to this ruling defendants' counsel duly excepted.

120 Q. At the time Mr. McKinney presented this check first, in the afternoon of that day, at the time you refused payment, state whether you said anything to him about your reasons for refusal; and, if so, what they were.

COURT: State what you said to Mr. McKinney when he presented the check, if anything—anything more than that you would not pay it.

WITNESS: Mr. McKinney and Mr. Norton both came to the bank.

COURT: They didn't come together, did they?

A. Afterwards they did.

COURT: They asked you at the time Mr. McKinney came there—anything else said than that you refused payment, or anything else take place at that time? You don't recollect whether there was or not?

WITNESS: There was some conversation occurred; I was trying to recall just what it was; I don't know that I can. I asked him—I said this to him, among other things—I know I said that I did not recognize that he had any right to that. He said as being county paper—he said he wanted the county deposit—something to that effect. My recollection is that I stated to him that the check did not represent anything to us, did not represent any consideration, and we would not pay it. Subsequently they both came up to the bank.

Cross-examination by Mr. WINSOR:

Q. You say that in the conversation down to the bank in the evening you told them that this check had been diverted from the purpose for which it was issued?

A. I think those were my words; that is the idea.

Q. What was the purpose for which it was issued?

A. Well, I suppose I am at liberty now to give the whole history.

121 COURT: Yes; give the whole of it.

WITNESS: I propose to tell the truth and the whole truth about it, if that is what they want, and let it hurt whom it may.

Mr. Howard came into the bank and wanted some help to make the settlement with the county commissioners, and he stated at that time he was behind considerably. I had not known before how much it was, and he came down to the bank with tears in his eyes and said that the penitentiary was staring him in the face and that he had to have some help. I proposed to let him have some money to help him out. He said he had available assets that he could realize on in the next six months and make him square with the county. I believed it, and I don't know to-day but he would have if he had been let alone. Against my judgment I consented to help Mr. Howard to keep out of the penitentiary, because any man who lives in that county knows how Mr. Howard got in this condition, and it was not through any fault of his own, and I felt as though I would like to help him and proposed to give him money to carry him over temporarily, to help him make his settlement with the county commissioners. That is all there is in it. My judgment was overruled on the matter and this check was issued and he carried it off.

The COURT: The check was issued in place of money?

WITNESS: No, sir; he had no money there to amount to anything. My proposition was to let him have money as a matter of accommodation to him.

The COURT: Finally, instead of letting him have money you let him have this check?

WITNESS: That is about the way of it; yes, sir.

By Mr. WINSOR: This check was given to him for the pur-
122 pose, was it not, of showing the county commissioners or representing to them that that amount of money he had to his credit as county treasurer?

A. No.

Q. Wasn't it given for that? Was it not given for the purpose of settling with the county commissioners?

A. Yes, sir.

Q. And for the purpose of representing that amount of money in the settlement to the county commissioners, was it not?

A. You might make——

DEFENDANTS' COUNSEL: This *si* all objected to; the paper itself shows and is the best evidence of the purpose for which it was given.

WITNESS: I simply stated my purpose was to help Mr. Howard.

By Mr. BOYCE: I will ask you if there was anything said about certified checks.

A. Mr. Howard asked for a certified check, but was refused.

By Mr. WINSOR:

Q. This was given instead?

A. No; I don't think——

Q. It was given?

A. Yes, sir; this was given. I do not think it was the same transaction.

Q. I understand you he asked for a certified check and that was refused and this was given?

A. Yes, sir.

Deposition of PORTER P. PECK was offered in evidence by the defendant and read to the jury as follows:

I reside in Sioux Falls. In January, 1886, I was assistant cashier of the First National bank; R. J. Wells was president, and Warren F. Furbeck was cashier. I know there was a check of some
123 $16,000 issued to C. K. Howard. The first I knew positively that such a check had been issued was after it had been refused by the bank. I don't remember what day that was. About the time the county board was in session C. K. Howard was in the office of the bank very often. I think it was about the 12th or 13th of January—about the time the board was in session—he was in there a great deal. He was running in and out quite frequently. I think he was in there on the afternoon of the 12th, and when he went out he had something in his hand. I could not say what it was, but I think it was a check, and he remarked to Mr. Wells and Mr. Furbeck that he would bring it back in twenty minutes. They seemed to have been charging him about something. I assisted in the organization of the Dakota National bank. I think this was in December, 1883. I was cashier of the bank up to 1886. I was employed by the First National bank from January to March.

Q. How often in your experience as a banker in this city have you handled an individual check to the amount of $16,000?

Plaintiff's counsel objected upon the grounds that it is incompetent, immaterial, and calls for the private transaction of the gentleman.

Which objection was sustained by the court, and to this ruling defendants' counsel duly excepted.

Q. Do you remember what you did the evening of the day the check was presented to the First National?

A. I was in the Cataract house part of the evening and in various places around, but later in the evening I was in the banking-house of the First National; also was down in the Sioux Falls National. Mr. Wilkes was with me when I went there. Mr. Wilkes requested
Mr. McKinney and Mr. Norton, as president and cashier of
124 the Sioux Falls National, not to press the First National for the payment of that check, but to charge it back to the parties, as it was dishonored for the reason of the bank's not having received any value therefor, and insisted upon their not pressing the payment, but to charge it back; that was the burden of the conversation. Mr. McKinney said he should insist on the First National folks paying the check.

Cross-examination by Mr. KEITH:

This conversation that I have spoken of between Mr. McKinney and Mr. Wells was, I think, on the evening of the 13th; it was the same evening the check was dishonored. Mr. Norton, Mr. Wells, Mr. Wilkes, Mr. McKinney, and myself were in the bank at the time. I knew of Messrs. Wilkes, Wells, and Furbeck being down to the plaintiff's bank that evening; I think they told me they had been there.

Q. Did you state to Mr. McKinney on that occasion that if you had anything to do or say about that check the First National would pay it?

Defendants' counsel objected to this question as not proper cross-examination, incompetent, irrelevant, and immaterial; also that it calls for a statement of the witness and his opinion, and no statement of this witness *are* in any way binding on the First National bank.

Which objection was overruled by the court, and to this ruling defendants' counsel duly excepted.

WITNESS: I do not know that I said that. I may have stated that, but whether it was on that occasion or not I cannot say. I do not think that the conversation became general enough that such statement was made on that occasion. I do not deny having made it.

125 *W. H. Corson.*

Deposition of W. H. Corson was offered in evidence by the defendants and read to the jury as follows:

I reside at Sioux Falls; have lived there some 15 or 16 years; am one of the proprietors of the Cataract house; have been acquainted with Charlie Howard 17 or 18 years; have been on his bond as county treasurer during that time; am acquainted with D. R. Bailey, George H. Brace, and C. C. Carpenter; in January, 1886, Mr. Brace was the president and Mr. Carpenter cashier of the Dakota National bank; am also acquainted with C. E. McKinney, Arthur Currey, and Charlie Norton; they were officers of the Sioux Falls National bank in 1886. I have seen a check purporting to have been drawn by W. F. Furbeck for about $16,000 to the order of C. K. Howard, county treasurer, upon the First National Bank of Sioux Falls. I think the first time I saw that check was in the county commissioners' room; we were trying to get our matters straightened up on this county treasurer business. I was on the bond and was seeking to get released. I never had the check in my possession; it was put into the box with other moneys and taken down to the Dakota National bank.

Q. What was done and said and what occurred there and who were present?

Plaintiff's counsel objected to this question as incompetent and

immaterial and does not show that the plaintiff had any knowledge.

Which objection was sustained by the court, and to which ruling defendants' counsel duly excepted.

WITNESS: I should say this was about half past eleven in the morning of January 13th.

Q. Did Mr. Irvine take the check at your instance to the
126 First National bank and present it for payment?

A. I think he did.

After dinner, somewhere about two o'clock, the box, money, and check were taken to the Sioux Falls National bank. I was in the Dakota National bank that morning, probably, for an hour and then went to dinner. The money and box were left in the Dakota National bank while we were at dinner.

Q. Was there anything said about giving of a bond at the time?

Plaintiff's counsel objected to this question as incompetent and immaterial; which objection was sustained by the court, and to this ruling defendants' counsel duly excepted.

Q. Did you agree to endorse it?

A. We did not.

After or before dinner—a very short time after we came out of the bank—Mr. Bailey met Mr. Hollister some place and Harry came over to me and said, "The Sioux Falls National will take the check and give us credit for that amount of money." I told Harry it was my idea that it was the best thing that we could do. After dinner we went over together and took it down to the Sioux Falls National bank. We went out of the back door of the bank and took the river route and went into the back door of the Sioux Falls National. I think we met Mr. McKinney, Mr. Norton, and Mr. Bailey at the Sioux Falls National bank. I do not know; there might have been some other parties there. Mr. Hollister carried the box. Our object in going the river route was becau-e it was the shortest way to go to the Sioux Falls National bank. Mr. McKinney did not meet us at the back door of the Sioux Falls National bank. I could not say where we met him. We passed right into the
127 second room after coming in at the door and put the box on the desk. We were in the directors' room, I suppose. It is the first room back of the banking-room proper. It is the room where I mostly do business with Mr. McKinney. I don't think I could tell what was said and done there, except the counting of the money. I don't recollect any conversation particularly. We went out as quick as we could. I think Mr. McKinney said if the check was not paid the bank would not open their doors to-morrow morning. There was nothing said concerning our going from the Dakota National bank there. I do not think there was any word of caution expressed by Mr. McKinney or Mr. Curry while we were in that room. There was no caution given me on the part of any of the bank. There was some little caution that I was to take care of myself. I wanted to come—get out as quick as possible.

Q. What was the occasion of so much haste?

A. Well, I knew there was a question in regard to this check, of course.

Q. Did you know the state of Mr. Howard's account—of his being in default with the county treasury?

Plaintiff's counsel objected to this question as incompetent and immaterial; which objection was sustained by the court, and defendants' counsel duly excepted.

WITNESS: I think there was nothing further said about the paying or not paying of this check by Mr. McKinney or any of these parties present. We were talking about the thing in a general way. I don't call to mind the conversation or any part of it during that time. I do not think there was anything said about our having presented it to the First National bank.

Q. Do you not remember, Mr. Corson, of his using an expression like this, cautioning you not to say anything about the
128 check having been presented?

A. I think there was such a conversation, but when it occurred I could not tell. I could not tell whether it occurred at that time or some other. I know they sent for us to come down the next morning. It might have been at that time or some other time. I think Mr. McKinney sent for myself, Mr. Hollister, and Mr. Coats.

Q. Is it not a fact that he cautioned you about saying anything about the check to any one?

A. I don't recollect that Mr. McKinney cautioned us about saying nothing about the check to any one. I heard such a remark, but who it came from I do not know. I could not identify the parties who spoke of it. I know it was talked among ourselves that we had better know as little about it as possible. I think that conversation was had by some of these parties I have mentioned. But I do not know who it was made by, nor who was present, or anything about that part of it. I could not tell whether it was in the bank or where it was; I am not sure.

Cross-examination by Mr. KEITH:

We went down to the bank the next morning after we made the deposit. In the meantime the Sioux Falls National had presented the check. It was not on that occasion that he said that if they did not pay it their doors would not open to-morrow morning. I am quite sure about that, because Mr. Coats and I were talking about it afterwards and he asked me if I recollected that conversation. It was quite a good while afterwards that we had that conversation. I was before the county commissioners on January 13th, about the time that this check was delivered to the bondsmen. I knew that this matter was going to be handled in that way.

129 *C. Frank Irvine.*

The deposition of C. Frank Irvine was next offered in evidence by the defendants and read to the jury as follows:

I reside in Sioux Falls and have resided there four years. My business during that time has been bank clerk. I have been connected with the First National Bank of Sioux Falls, People's Bank of Dell Rapids, and the Dakota National bank. I was with the First National bank from May 1st, 1883, to July 1st, 1884; am now with the Dakota National bank, and have been about 17 months. In January, 1886, I was employed in the Dakota National bank. I have seen a check purporting to be a cashier's check, issued by the cashier of the First National Bank of Sioux Falls, to the order of C. K. Howard for some $16,000. I cannot give the date that I saw it. It was about the 12th of January. I was in the front room of the Dakota National bank. Mr. Brace, the president, came out of the back room, and he and Mr. Carpenter, the cashier, and I looked up the check together. I took the check and went across the street to the First National and presented it at the counter for payment W. F. Furbeck was at the counter. I presented the check to Mr. Furbeck; he took it and showed it to Mr. Wells, who was sitting near, and he and Mr. Wells came to the window together, and Mr. Wells said, "I don't propose to pay that." I took the check then and went back to the Dakota National bank. I should say this was about eleven o'clock in the forenoon. I don't remember of anybody else being present besides Mr. Furbeck and Mr. Wells. Mr. Furbeck was cashier and Mr. Wells president of the First National bank at that time. H. L. Hollister, C. G. Coats, and D. R. Bailey were in the back room of the Dakota National bank at that time. I think Mr.

130 Brace handed me the check. I was clerk in the Dakota National bank at that time. I do not know who owned the check. It was endorsed "C. K. Howard." I do not know who brought the check in. After I returned I gave it back to Mr. Brace and didn't see it again after that. There was a tin box placed in our vault that day during the noon hour. I do not know whose box it was nor what it contained.

Cross-examination by Mr. KEITH:

I do not know whether Mr. Bailey was in our bank when I went back, after I had taken the check to the First National. I remember that after presenting the check of Mr. Brace and Mr. Bailey talking with me in regard to it. I do not remember whether they asked me to state just what Mr. Wells said. I did not state to them that Mr. Wells said when the check was presented, "We will not pay it now" or "I do not propose to pay it now." I remember the exact words used by Mr. Wells when I presented the check. I didn't make a memorandum of it. I talked with T. B. McMartin, one of defendants' attorneys, yesterday and this morning about what Mr. Wells said.

*Charles C. Carpenter.*

Deposition of Charles C. Carpenter offered in evidence by the defendants and read to the jury as follows:

I have resided in Sioux Falls about two years and a half; am connected with the Dakota National bank. The Dakota National bank was on the east side of Phillips avenue; the First National was on the opposite side, nearly opposite our bank, and the Sioux Falls National was located at the lower corner of the same block as the Dakota National, on the east side of the street. The block in which the Dakota National and the Sioux Falls National banks are located is not a full block. There is a vacant space of 20 or 30 feet between the Dakota National bank and the river. That
131 open space extended down nearly to the lower end of the block; am acquainted with H. L. Hollister, C. G. Coats, D. R. Bailey, and W. H. Corson. I think that they were all together in our bank about the 13th of January, 1886.

Q. Now, Mr. Carpenter, will you state in your own words what took place at the time you saw them there together? And if they had any business with the bank please state it.

PLAINTIFF'S COUNSEL: Objected to as incompetent, immaterial, and improper.

2nd. No proper foundation laid for the question.

3rd. Purports to give a conversation had between the witness and some other parties not in the presence of the plaintiff, and

4th. Heresay.

COURT: Objection sustained.

Defendants' counsel duly excepted.

WITNESS: I think that after dinner I had a conversation with Mr. Hollister about getting the credit at another bank. The tin box was left in our safe during the noon hour. I think Mr. Coats took it from the bank. Mr. Bailey, Mr. Hollister, Mr. Corson, Mr. Coats, Mr. Brace, and myself were present at the time of its being taken.

Q. What was done with the box and check?

A. Some of them went out our back door; which ones I could not say. The parties that went out took the box. I took dinner that day at the Cataract house with Mr. Brace. Mr. McKinney was at the table, and I think there were some ladies present. I had but very little conversation with Mr. McKinney at the table. I think he asked me if I had been up to the commissioners' room or if I had heard what they had done about settling with the county. I told him I had not. I cannot remember of anything further that was said.

132 (Witness shown Exhibit "A" attached to Howard's deposition.)

Q. I will ask you, Mr. Carpenter, to look at this and see if it is a copy of the check that you referred to as having been brought to your bank for the purpose of depositing that with other currency that was in the tin box.

A. I should say that the amount seems to be the same. I cannot remember the exact wording, but should say it was the same.

GEORGE H. BRACE, called and sworn in behalf of the defendants and examined by Mr. MCMARTIN, testified as follows:

I am president of the Dakota National bank and have been a little over two years; was president of that bank in January, 1886; am acquainted with Charles E. McKinney. He was president of the Sioux Falls National bank at that time. I took dinner at the Cataract house on January 13th, 1886. Both McKinney and myself boarded there at that time and were in the habit of sitting at the same table. I think Mr. McKinny asked the question in what little conversation there was—there was not much said upon the subject—I think he asked the question if I knew who was to get the deposit, and I replied, I did not. The deposit that was referred to was the county treasurer's deposit. There was not much said, but I think there was something of that kind said. I think Mr. Carpenter, Mr. McKinney, and myself were all that were sitting there at that time; probably some one else might have been there; I cannot say as to that.

A. T. LEWIS called and sworn in behalf of the defendants and examined by Mr. MCMARTIN and testified as follows:

I reside in Sioux Falls and am a photographer. (Witness shown photographs.) I have seen these before.

Q. Please state to the jury what they are.

Plaintiff's counsel objected.

DEFENDANTS' COUNSEL: I wish to offer in evidence and
133 identify some photographs showing the river route taken by the bondsmen.

Plaintiff's counsel objected as incompetent and immaterial.

DEFENDANTS' COUNSEL: We offer to show and introduce in evidence photographs showing the location of the Sioux Falls National bank, also the Dakota National bank, showing the manner in which it abbuts on the river bank, for the purpose of intelligently explaining to the jury the manner in which this deposit was made.

PLAINTIFF'S COUNSEL: Objected to as incompetent and immaterial.

COURT: Objection sustained.

Defendants' counsel duly excepted.

Defendants offered in evidence a certified copy of the proceedings of the board of county commissioners of Minnehaha county from the 12th day of January, 1886, up to and inclusive — the 19th day of January, 1886, which was read to the jury as follows:

*Record of County Commissioners of Minnehaha County, Dakota.*

JANUARY 12TH, 1886.

C. K. Howard presented his semi-annual statement, and the settlement with the county treasurer commenced and books — vouchers examined until adjournment. The afternoon was devoted to settlement with county treasurer.

JANUARY 13TH, 1886.

On motion of Arthur Jones, the following resolution was adopted:

Whereas, in the opinion of the board of county commissioners in and for Minnehaha county, D. T., the bond heretofore given by the county treasurer has been rendered less strong by the removal from the county and Territory of one of the sureties (J. B. Young)
134 upon said bond:

Therefore be it resolved, That the county treasurer of Minnehaha county be, and he is hereby, required by this board to give additional freehold sureties in the penal sum of $50,000, it being the opinion of the majority of said board of commissioners that the existing security has become insufficient for the proper indemnity of said county.

On motion, the following resolution was adopted:

Resolved, That the funds presented to the board of county commissioners of Minnehaha county by the treasurer, C. K. Howard, in settlement of his accounts with the county be, and *is* hereby, turned over to his bondsmen and the bondsmen are put in charge of the office of county treasurer until the additional bond is furnished, said funds to be deposited and remain the funds of Minnehaha county.

The afternoon was devoted to county-treasurer business.

JANUARY 18TH, 1886.

On motion, the following resolution was adopted:

Resolved, That the semi-annual settlement made with C. K. Howard, county treasurer of Minnehaha county, to January 1st, 1886, be, and the same is hereby, approved, and the vouchers and accounts having been found correct, as per statement filed January 12th, 1886.

*Afternoon.*

To the honorable board of county commissioners of Minnehaha county:

GENTLEMEN: I hereby tender my resignation as treasurer of the county of Minnehaha, to take effect immediately.

C. K. HOWARD,
*Treasurer of Minnehaha County, D. T.*

On motion, the county treasurer, C. K. Howard, is hereby
135 required to settle his account to date.

On motion, the following resolution was adopted:

Resolved, That the resignation of C. K. Howard, county treasurer of Minnehaha county, be, and the same is hereby, accepted.

On motion, the following resolution was adopted:

Whereas the Hon. C. K. Howard has resigned the office of county treasurer of Minnehaha county, Dakota Territory, and, in consequence of said resignation, said office has become vacant: Now, therefore, we, the board of county commissioners for said county of Minnehaha aforesaid, do hereby appoint C. L. Norton, of Minnehaha county, Dakota Territory, to the office of county treasurer of said Minnehaha county to fill the vacancy in said office for the unexpired term for which the Hon. C. K. Howard was elected and until the next general election or until his successor is elected and qualified.

On motion, the following resolution was adopted:

Resolved, That whereas we have this day appointed Charles L. Norton treasurer of Minnehaha county, Dakota Territory, that we do hereby require the said Charles L. Norton to give a bond to said county in the penal sum of $100,000, with good and sufficient freehold sureties.

JANUARY 19TH, 1886.

On motion, the following resolution was adopted:

Resolved, That the bondsmen of C. K. Howard be, and they are, directed to turn over to the county commissioners of the county of Minnehaha and Territory of Dakota all the evidences of deposit and all funds belonging to the county of Minnehaha.

The official oath and bond of Charles L. Norton as county treasurer was presented, and, on motion, the bond was approved.

The check of the bondsmen in the sum of $27,236.63, certified to by C. E. McKinney, president of the Sioux Falls Nat. bank,
136 in full discharge of said bondsmen for the funds received of the county of Minnehaha January 13th, 1886, was accepted on the following vote:

Yeas: Bannister, Thompson, & Derdahl.

Nays: Jones.

And the funds turned over to Charles L. Norton and the following receipt issued and signed by the said Chas. L. Norton as Co. treas.:

Received of the county commissioners of the county of Minnehaha and Territory of Dakota the sum of twenty-seven thousand two hundred thirty-six and $\frac{63}{100}$ dollars in currency, being the funds belonging to the county of Minnehaha.

(Signed) JOHN McKEE, *Chairman.*

N. E. PHILLIPS, *Co. Clerk.*

W. A. WILKES, called and sworn in behalf of the defendants, examined by Mr. BOYCE, testified as follows:

I reside in Sioux Falls and am a lawyer; have resided in Sioux Falls nearly 9 years; am acquainted with Messrs. McKinney, Norton, Wells, Furbeck, Peck, C. K. Howard, E. G. Wright, and N.

E. Phillips, and was acquainted with them in January, 1886. I knew of the proceeding in regard to the settlement of C. K. Howard, county treasurer, and the board of county commissioners of Minnehaha county in January, 1886. The first occasion that I was present in the room where the commissioners met during that settlement was on the evening of the 12th day of January, the evening that the check was given. Mr. Phillips and Mr. Wright and some of the commissioners were there, but who I will not attempt to say. The board was not in session. I spoke to Mr. Wright and also to Mr. Phillips. It was very late in the day—almost dark. I
137 have seen the check upon which this action is brought. I think I first called Mr. Wright to me or walked towards him—he was off at one side of the room—and inquired of him concerning the proceedings of the board. I stated to him that I understood that there was a check that was before the board involving the matter of Howard's settlement, and I wanted to notify them not to take into consideration that check involving so much money; that the bank would defend against it as in the hands of Howard and refuse payment. Substantially that is what I said to him and substantially the same to Mr. Phillips, the clerk, although not quite so fully in the talk I had with him as with Mr. Wright. I said nothing else either to Mr. Wright or Mr. Phillips at that time. I went there at the request of Mr. Wells, president of the First National bank. I was there the next day when the board was in session, and talked with the board there concerning this matter. I think it was in the afternoon of the day following—the 13th.

Mr. WINSOR: Was this conversation had with the board of county commissioners?

A. I did not say I had a conversation with the board. I said I went before the board, I think, on the 13th, in the afternoon, I think it was. It might not have been.

Mr. BOYCE:

Q. What did you say, if anything, to the county board at that time?

A. Well, without being able to state exactly my words, I notified the board not to make any settlement with Mr. Howard involving this check in suit as representing the cash that it called for, and that is what I was there for. I had a conversation with Mr. McKinney and Mr. Norton at their bank concerning this check
138 in the evening on the 13th day of January, the day before the action was commenced. I think there were present Mr. Norton, Mr. McKinney, Mr. Keith, Mr. Wells, and Mr. Furbeck a part of the time and myself, and later in the evening Mr. Peck and myself alone together, when the others were gone, with Mr. McKinney; possibly Mr. Norton was there at the time. I went there in company with Mr. Norton and Mr. Wells. I said to Mr. McKinney substantially what we wanted them to do. What we would like them to do was to change this check back to the depositors from

whom they got it and not to get into any lawsuit, which would be injurious to both of the banks and to the community, but to charge the check back. I used the expression over and over again, "You have not paid out anything on it; you have not suffered anything on it; charge it back." They declined to do so, and McKinney replied at one time during the conversation substantially like this: "The First National bank has been doing that thing off and on, time and time again, for years, and we don't propose to charge it back," and refused to do so. Later in the evening, after going to the First National bank, Mr. Peck and I went down there alone. At that time I renewed the conversation with Mr. McKinney upon the same subject and endeavored to have them charge the check back, which they refused to do.

COURT: They always refused to from that time on?

WITNESS: They brought suit the next day.

Defendants offer in evidence a portion of the cross-examination of C. K. Howard by Mr. Wilkes contained in his deposition taken by the plaintiff before H. T. Root.

Plaintiff's counsel objected to the reading of a portion of the deposition. If they offer any part they should offer it complete
139 and read the whole of it. By so doing they make the witness their own witness.

Defendants' counsel offered in evidence and read to the jury that portion of the cross-examination by Mr. Wilkes of the witness C. K. Howard contained in his deposition taken by the plaintiff before H. T. Root, which reads as follows:

My recollection now is that it was during banking hours that I went to the First National bank and obtained this check introduced here in evidence, but I am not positive in regard to the matter. My impression is that this check was delivered to me late in the day; still I cannot be positive. I cannot remember exactly when it was delivered to me. I had several consultations with both Mr. Wells and Mr. Furbeck in regard to the matter. I know I talked with both of these gentlemen at different times. At the time I got this check I had a conversation with both parties. Mr. Furbeck delivered the check to me personally. I remember when I went there on this last occasion, when the check was delivered to me. I wanted to get the money instead of a check. I remember saying to them, "Of course if I take the money and that was counted that would be the end of it." There was some talk about money. I cannot exactly remember. I had to settle a number of these matters as far as I can remember. I cannot place it all in my mind positively, as I said. At the time I was somewhat excited and considerably worried. I cannot call to mind every circumstance connected with this transaction, not thinking at the time that it was necessary to tax my memory with it all. I know there was some talk about money. I do recollect that there was some talk about money, and I remember of Mr. Wells saying that they had the money to give me to make this settlement, but as to why I was not

furnished the money and why I took the check I cannot
140 remember the exact circumstances or the conversation. I remember saying to him that the commissioners wanted a certified check. I then went to Mr. Furbeck and stated to him that a certified check was all that was necessary to accomplish this settlement. Mr. Furbeck said, "We do not issue certified checks, but I will give you a cashier's check;" and that is as near as I can remember. That conversation was had with Mr. Furbeck. I can remember of Mr. Wells suggesting to me something in relation to money—that they had ample money to furnish me; but, as I stated, as to why the change was made I do not now remember. My recollection is that this transaction was quite late in the day. I had been busy all day with my settlement. (The following portion of witness' answer to same question was omitted, to be read by defendants' counsel: "I first appeared before the board with the bank book. I afterwards appeared with the letter from the president of the bank, and my recollection is that this last transaction was quite late in the day.") But I cannot state positively as to the time Mr. Furbeck handed me the check. I went direct from Mr. Furbeck to the board of county commissioners. I was a little on the anxious seat myself then, and I was in a hurry. When Mr. Furbeck gave me the check I told him, as near as I can remember—I cannot give the exact words, but the tenor of the conversation was that if they would allow me to straighten up everything I would deposit the check and the currency in the morning. I refer to the money that I had on hand, which I had retained in my private box in the vault in the treasurer's office until the settlement. I told Mr. Furbeck that no doubt that would complete my settlement, and as soon as I had perfected a settlement I would return the check and also
place to the credit of the county what money I had in my
141 possession, some twelve or fourteen thousand dollars. It was the understanding that this check was not given to me to be treated as a valid and binding obligation against the defendant in this suit, but was simply loaned to me and a credit of the bank. The understanding between me and Mr. Furbeck was that I was to return the check in the morning and I was to deposit to the credit of the county the money that I had in my possession belonging to the county. I remember that I assured Mr. Furbeck when I took the check that it would be a very temporary transaction; that I would return the check in 20 minutes; that I would be back in the evening. This money I refer to as going to deposit was money I had in my office, and not money which I took from them; it was an additional deposit. I told him I had about $14,000—$12,000 or $14,000—which I would deposit in the morning as soon as my settlement was perfected. The understanding was that I was to return the check, and I should have returned it if everything had gone through as I expected. I did not give my check upon the bank for the amount of this cashier's check. I went from the bank to the commissioners with this check. The entire board were there at the time and in session. I remember of seeing Mr. Bailey, Mr. Hollister, and Mr. Coats there. They appeared there frequently

after my appearance before the board. I had been before the board during the entire session of the board that day figuring up and making my semi-annual settlement and statement. My recollection is that Mr. Hollister and Clark Coats and Mr. Bailey were there several times previous to this time when the check was delivered during the day preceding. Of course it was a public meeting, a public matter, an open session of the board, and parties were out and in frequently. I don't think Mr. Keith was there. I had trouble enough of my own at that time and
142 was not looking particularly at the outsiders. I was there quite early the next morning. I saw those men whom I have mentioned there the next morning, excepting Mr. Keith. I do remember of Hollister and Bailey being there. Clark Coats came in temporarily; he was there but a short time. Mr. Wright and N. E. Phillips were present when I brought the check and delivered it to the commissioners. I handed the check to the chairman of the board. I made the endorsement on the check that evening. I am quite positive that it was not endorsed until after I handed it to the chairman and the board had examined it. I think it was at the suggestion of Mr. Wright or Commissioner Jones that I endorsed the check. My impression now is that it was suggested by Mr. Wright. I cannot be positive. I did not take the check back to Mr. Furbeck, as was agreed upon. The reason was that the other fellows were a little stouter that I was and they took it away from me. By the other fellows I mean the commissioners and my bondsmen. My bondsmen appeared before the board through their attorney, Mr. Bailey, and made some kind of a demand, I don't remember just exactly what, claiming that a settlement had been perfected, the funds of the county had been turned over as per our settlement, and they demanded a release from any further action upon my bond, and upon this demand, the statement being made by my bondsmen through their attorney, the board took possession of the stuff and deferred action until the next morning. This occurred the evening that I brought the check to the commissioners. I cannot state positively as to whether the check had been endorsed or not when that demand was made by my bondsmen.

Q. Then I understand you the commissioners to whom you delivered the check refused to give it back again to you. They
143 were the parties to whom you referred as being stouter.

A. Well, that was, perhaps, a rather broad way of stating it. They took possession of my funds, papers, and effects pertaining to the settlement which were then presented.

My bondsmen appeared before the board through their attorney and demanded or asked for a release or withdrawal from my bonds. The commissioners did not give the check and money back to me. I have never had it since. They did not take possession of it with my consent. The check was endorsed that evening. My bondsmen, at the time they made this demand, set up largely in excuse for their action that Mr. Young, who was one of my principal bondsmen—either the next day or the day following I tendered my resignation as county treasurer. I said to them, Of course, if they

proposed to run the thing, why I didn't know as they needed any fifth wheel to the wagon. I was present before the commissioners when they took action turning this check over to my bondsmen.

Q. Was that on the day following the time when the check was delivered?

A. I am not positive whether it was the day following or the day after. I cannot remember now positively. My recollection is, though, it was the morning following this transaction.

Plaintiff's counsel then proposed to read the remainder of the deposition of C. K. Howard, claiming the right to read the same as cross-examination of the testimony of said witness read by the defendants' counsel.

Defendants' counsel before the trial had filed exceptions in writing to a large portion of the testimony which plaintiff's counsel now propose to read, and had requested that said exceptions be
144 passed upon by the court before the commencement of the trial. The defendants' counsel now objected to the reading of any portion of the testimony of said witness Howard which was excepted to by said exceptions in writing filed in the cause before the commencement of the trial.

Which objection was overruled by the court, and to this ruling defendants' counsel duly excepted.

Plaintiff's counsel then proceeded to read the portions of the deposition omitted and left out by the counsel for the defendant.

Whereupon defendants' counsel again objected upon the ground that these portions are covered by exceptions in writing filed in the cause, which exception defendants' counsel have requested should be first passed upon by the court as to their competency, materiality, or relevancy, and renewed these exceptions to the testimony.

Which objection was also overruled by the court, and defendants' counsel duly excepted.

Plaintiff's counsel then read as follows:

"Mr. Howard, wasn't this transaction quite late in the afternoon, and almost dark, dusk? A. My recollection is it was quite late in the day. I had been busy all day with my settlement. I first appeared before the board with the bank book. I afterwards appeared with the letter from the president of the bank, and my recollection is this last transaction was quite late in the day, but I cannot state positively as to the time."

(The words "I first appeared before the board with the bank book. I afterwards appeared with the letter from the president of the bank, and my recollection is this last transaction was quite late in
145 the day," were the words contained in the cross-examination — said witness by Mr. Wilkes which were not read by defendants' counsel, and to which exceptions in writing had been filed; which exceptions were as follows:)

That the testimony was not responsive to the question, not called for.

Also that the acts therein testified to form no part of the *res gestæ*,

the plaintiff's cause of action, as appeared by *his* complaint, being as an endorsee of negotiable paper, and the action being founded upon the check set forth in the complaint, while the testimony relates to matters occurring prior to and not connected with the check, and is otherwise incompetent, irrelevant, and immaterial.

Which exceptions were overruled by the court, and to this ruling defendants' counsel duly excepted.

Defendants' counsel then moved to strike out said testimony on the ground that it was not proper cross-examination of the testimony read by the defendant-; which motion was overruled by the court, and defendants' counsel duly excepted.

Plaintiff's counsel then read the balance of the deposition of said witness, being the examination of said witness by pl'ff as contained in his deposition, as follows:

My name is Charles K. Howard; I reside in Wayne township, Minnehaha county; have lived there 18 or 19 years. I kept the county deposits while I was county treasurer with the First National bank during all the time after it was organized. J. B. Young was president and H. L. Hollister was cashier of the bank up to some time in 1885. R. J. Wells succeeded J. B. Young as president,
146 and I think Mr. Hollister retired as cashier of the bank some two or three months prior to the time Mr. Wells assumed the duties as president. W. F. Furbeck succeeded him as cashier. Mr. Wells and Mr. Furbeck continued as president and cashier up to the time the bank become somewhat embar-assed and the receiver was appointed; that is my understanding of it. I made my settlement as county treasurer with the commissioners semi-annually, in July and January in each year. R. J. Wells was president and W. F. Furbeck cashier of the First National bank in January, 1886.

Q. You may state whether you had any arrangement or agreement with the officers of the First National bank to furnish you funds to make your settlement with the board of county commissioners in January, 1886.

To which question defendants' counsel duly excepted in writing as follows:

1. The question is leading.

2. The officers of the bank have not been shown to have had any authority to make such an arrangement or agreement.

3. The question assumes that the arrangement, if any was made, was to furnish funds, which is one of the questions in dispute.

4. Neither the bank nor its officers have any authority under the national banking law to make such an arrangement or agreement.

5. The inquiry is not shown to relate to or be connected with the check in suit.

Which exceptions, each and all, were overruled by the court, and to this ruling defendants' counsel duly excepted.

A. Yes, sir.

4. "For a number of years I had been somewhat mutually inter-

ested with the First National bank in different enterprises.
147 It was the understanding with the old management of the bank, with Mr. Young as president and Mr. Hollister as cashier, that ther were to sustain me in the business which I was interested in and in some matters in which we were mutually interested.

"When I learned of Mr. Young's retirement from the active management of the bank I went to him and asked him if it was going to make any difference with my being sustained there as I had been heretofore."

By Mr. WINSOR: You refer now as county treasurer?
A. Yes, sir.
Q. Sustained you as county treasurer?
A. Yes, sir.

"And it also applied to our general business, general matters in which we were mutually interested. I told him that I understood that he was going away, and if he went away without leaving any explanation of this matter it would place me in a very unfortunate condition, and I would like to know definitely what I could depend upon. He stated to me that while his family was going to California he did not expect to leave himself, and he had talked with the management as it now existed and had made such arrangements that I would be protected." 26.

To the evidence on this page from line 4 to line 26, both included, the def't- duly excepted.

Defendants' counsel excepted in writing before the trial upon the several grounds last above stated, as well as the following additional grounds:

6. It narrates a conversation between the witness and J. B. Young after Young ceased to be connected with the bank, and his statements, admissions, or declarations at that time are not evi-
148 dence against the defendant bank.

7. The statements of Young in that conversation are hear say.

8. The management of the bank, either by arrangement with Young or otherwise, would have no authority to bind the bank in the manner stated or inquired about.

9. The matters testified to have not been pleaded.

Which exceptions were each and all overruled by the court and to this ruling defendant- duly excepted.

Defendants' counsel, now on the trial, upon the several grounds stated in their written exceptions on file, moved to strike out all that has been testified to concerning Mr. Young or Mr. Hollister and the management of the First National bank, which existed prior to the time when these parties, Wells and Furbeck, were in the management.

Which motion was overruled by the court, and to which ruling defendants' counsel duly excepted.

P. 66, l. 4:

"I asked Mr. Wells if Mr. Young had talked with him about my matters, and he said he had, and they would help me out. This was a few days before my settlement. I had a talk with Mr. Wells about the settlement. There was nothing particularly said about the settlement any more than that they were to assist me in my settlement. I think Mr. Furbeck, the cashier, was there. I think I talked to Mr. Wells and Mr. Furbeck together about it, and I also talked with them separately about it. I told them I thought it would take about $15,000 to make my January settlement with the county commissioners."

149 Q. Whom did you state that to, Mr. Howard?

A. Well, my recollection is that I talked with both Mr. Wells and Mr. Furbeck about it.

Q. What did they say in reply to that?

A. Carried the idea they would help me out.

"I asked Mr. Furbeck what would be necessary for me to obtain the proper credit to show the commissioners. My recollection is that I proposed to Mr. Furbeck to give a note for that amount. He said it would be better for me to make some drafts to cover that much credit. I had had considerable business transactions with M. D. Steevers & Co., of Chicago, and had very frequently made drafts on them, which, of course, had been honored. He suggested that I make drafts on Steevers to cover this amount. I told him I could make drafts, but I had not the proper credit there which would obtain the payment of them. He said that would place his books in proper shape and he would charge it back to me in time; wanted to have the matter in a businesslike way—show a businesslike transaction and keep his books straight. It is just a matter of opinion whether these drafts would have been returned in the usual course of business before the time for me to make my settlement with the county commissioners. I really cannot positively state as to whether they would or not; I think, however, they would not have reached here in time. This conversation occurred a few days prior to my January settlement with the commissioners. I made the drafts. My recollection is I made one for $6,000, one for $4,000, and one for $5,000. I think I made them on separate days. I am not positive, but that is my recollection. After making the drafts I deposited them in the First National bank—that is, to the credit
149½ of Minnehaha county, C. K. Howard, county treasurer; that was the way I had kept my account there in the bank—C. K. Howard, county treasurer." P. 67, l. 14.

To the testimony from p. 66, line 4, to p. 67, 14, defendants duly excepted.

The defendants' counsel duly excepted in writing, before the trial, on the following grounds, to wit:

1. It forms no part of the *res gestæ*. The action is on a check negotiable in form, to which above matters have no connection.

2. The matters testified to are not within the scope of the powers or duties of the bank or its officers.

3. They have not been pleaded, and could only be admissible, if at all, upon the theory that the defendant bank is estopped by its acts in issuing the check to deny its liability thereon, and had perpetrated a fraud in issuing the check, which matters have not been pleaded.

Which exceptions were each and all overruled by the court, and to this ruling defendants duly excepted.

Defendants' counsel also moved to strike out the testimony last above quoted upon the ground that it is not cross-examination of the testimony of said witness, read by defendants' counsel, in no way connected with it or relating to it, and upon the further ground stated in the written exceptions filed.

Which motion was overruled by the court, and to this ruling defendants' counsel duly excepted.

150 WITNESS: At my settlement with the commissioners in January, 1886, I appeared before the board with my books and vouchers and we settled up. There was a balance due the county up to the first of January of about $27,000. I also had in my hands several thousand dollars, which I afterwards turned in. I had cash on hand for the amount due the county, except this check, the amount, less some $15,000 or $16,000. I had this money before the board of county commissioners at the time in question.

Q. And what else did you have there?

A. I had money in connection with the bank book.

WITNESS: The bank book was written up in the bank by some of the officers of the bank and handed to me by some of the officers; I think Mr. Furbeck or some of the clerks. I haven't that book. I do not know whether I could find it or not. I have two or three wagon-loads of books laying around somewhere I haven't overhauled lately. I presume it is in existence some place. I do not know where it is; have not made any effort to find it. I will make an effort to find it if I am so requested. I do not know whether I can find it or not, but will do the best I can. I exhibited the bank book to the commissioners. They said no doubt that was all proper, but they would like to have some little further assurance that I had the stuff—the money.

The defendants' counsel excepted because said testimony and the acts and declarations therein testified to form no part of the *res gestæ*, the plaintiff's cause of action, as appears by his complaint, being as endorsee of negotiable paper and the action being founded upon the check set forth in the complaint, and the testimony relates to
151 matters occurring prior to and not connected with the check, and the testimony is otherwise incompetent, irrelevant, and immaterial, and also for same reasons last above stated.

Which exceptions and each and all of them were overruled by the court, and to this ruling defendants' counsel duly excepted.

Defendants' counsel further excepted to the testimony last above

quoted upon the ground that it is not cross-examination of anything read by the defendants and has not been pleaded by the plaintiff, and on the several grounds aforesaid moved to strike out the testimony.

Which exceptions and motions were overruled by the court, and to this ruling defendants' counsel duly excepted.

WITNESS: I then went down to the bank and told Mr. Wells and Mr. Furbeck that my settlement was all satisfactory and my books were all checked up and everything was perfectly satisfactory so far as the settlement was concerned, except the fact that the commissioners wanted some more conclusive evidence that I had that much money.

Defendants' counsel moved to strike out the words "more conclusive" on the grounds above stated in the last preceding exception, which motion was denied by the court, and to this ruling defendants' counsel duly excepted.

P. 69, l. 28:

"Q. Well, what was done by the officers of the bank, Mr. Wells and Mr. Furbeck?

A. If my recollection serves me, Mr. Wells gave me a letter and made a statement to the board to that effect—that is, that the books of the bank showed that I had, as county treasurer, a credit
152 to Minnehaha county of so much money, $15,000 or $16,000. I handed the statement which Mr. Wells gave me as president of the bank to the commissioners. I do not know what became of it. My recollection is they said that was getting a little nearer bed rock, but (p. 70, l. 7)—— "

The testimony from p. 69 & line 28 to p. 70, line 7, def'ts excepted.

Defendants' counsel duly excepted in writing before the trial upon the following grounds, to wit: for each and every of the same reasons given in the last above exception as to the last preceding quoted testimony, and also that the statement or letter therein referred to is the best evidence of its contents; also, because it does not appear that the commissioners asked for such letter or statement, that they relied upon the same to their prejudice, or that it is in any way connected with the check in suit; which exceptions were each and all overruled by the court, and to this ruling defendants duly excepted.

And for the same reasons defendants' counsel moved to strike out said testimony, which motion was overruled by the court, and to this ruling defendants' counsel duly excepted.

(Witness continued:) They would like a certified check. I then went down and got one. (Check shown witness.) That is the fellow, as near as I can remember. (Check identified as Exhibit "A.") I do not remember all that was said between Mr. Wells, Mr. Furbeck, and myself with reference to this check when I got it. As

near as I can remember what was said was simply this:
153 there was a check that they thought would answer my purpose and would aid me, assist or sustain me in perfecting a settlement with the board. I told Mr. Wells and Mr. Furbeck that the county commissioners requested of me a certified check. That is my signature on the back of the check and is in my handwriting; that is my endorsement. When I received the check from the First National bank I turned it over in settlement to the commissioners—enough to make, with the currency, $27,000, as near as I can remember—to the board of county commissioners of Minnehaha county. They were in session at that time. It was their semi-annual meeting. The check was counted with the funds I had on hand to make the required amount which I needed to make settlement with the county.

The grounds of the objections and exceptions in writing to portions of the depositions were not read or fully stated to the court upon the time of the action and were not denied or ruled upon, though they were referred to.

J. S.

154 It is conceded by plaintiff that J. Leslie Thompson is the receiver of the First National Bank of Sioux Falls, and was duly appointed as stated in his answer filed herein.

Defendants rest.

Plaintiff's counsel asks the court to direct a verdict in favor of the plaintiff. (The ground- of the motion were then fully stated, as hereinafter appears, at the conclusion of the testimony.)

The court said: "I would like to have a full history of the case made a part of the record, especially in regard to one or two more points, and I will then rule upon the request."

JOHN THOMPSON, called and sworn in behalf of the plaintiff and examined by Mr. KEITH, testified as follows:

I am one of the county commissioners of Minnehaha county; have been a commissioner since January 1st, 1886. I was one of the commissioners when Mr. Howard made his semi-annual settlement in January, 1886. The board of county commissioners at that time was comprised of Mr. John McKee, chairman; Arthur Jones, G. D. Bannister, Ole Berdahl, and myself; N. E. Phillips was *ex officio* county clerk. I remember the occasion of the settlement with Mr. Howard as county treasurer. Mr. Howard presented his bank book to the board. He kept his account at that time with the First National bank.

Q. What did the bank book show?

Defendants' counsel objected on the ground that the bank book is the best evidence. There is nothing in the pleadings that will admit any such testimony, and it is incompetent, immaterial, and irrelevant.

155 Objection overruled. Defendants' counsel duly excepted.

A. I do not know enough about bank books to state what it did show in it. I am not an expert in bank books; the other members of the board examined the bank book. The board refused to take that in settlement, and told Mr. Howard to go down and either bring up the money or a certified check.

Q. What did he do?

A. He went back to the bank and brought up a letter certified, I think, by both the president and the cashier of the First National bank.

Defendants' counsel make the same objection as above; also same objection made to the question concerning the bank book; that that paper is the best evidence, and that it does not appear that these commissioners had any dealings with this bank whereby they were relying upon the representations contained in this letter or the bank book.

Objection overruled. Defendants' counsel duly excepted.

(Exhibit "B" shown witness.)

Q. You may state if this is a copy that is at the bottom, commencing here (indicating).

A. I think that is the contents of that letter that Mr. Howard brought back.

Plaintiff's counsel then read letter to the jury as follows:

"FIRST NAT. BANK, SIOUX FALLS, DAK., *Jan'y* 12, 1886."

The books of the bank show a credit in favor of the county of $15,625.01. If you wish you have the privilege of examining the books.

R. J. WELLS, *P't.*
W. F. FURBECK, *Cas.*"

156 WITNESS: That is a copy of the letter he brought and which I saw at that time. The board would not accept of any settlement without either the money, currency, or a certified check; that is what the board insisted upon.

Defendants' counsel moved to strike out the answer commencing with the words "they would not accept," etc.

Motion denied.

Defendants' counsel duly excepted.

WITNESS: Then he went back down to the bank to bring up either one or the other. He brought up a check. (Witness shown check in suit.) That is the check he brought up or one that is very much like it. I saw this check. We accepted that for that amount in settlement with Mr. Howard. He had some currency on hand. The amount of currency and some drafts and orders and that check made up the amount he was indebted to the county. That check was, I think, presented on the date it bears, January 12th, 1886. I am not positive what time of the day Mr. Howard went down after this check—somewhere near 4 o'clock in the afternoon. My reasons

for thinking it was about 4 o'clock are that there was some talk that he would have to hurry or it would be after banking hours. The reason I think it was not after 4 o'clock is that the front doors of the bank were yet open. I know that because I went through the front door myself after telling Mr. Howard, the treasurer, to bring the check for the whole amount. Through some error we had given him the wrong figures for the amount to make out the balance of 27,000 odd dollars, the whole settlement, and I went down and followed him up expressly for that purpose—to have him bring up a check for a different amount or a different amount of currency than he made it. I did not know whether he was
157 going to bring up the currency or a check.

Q. You went to the bank for the purpose of telling him that?

A. Yes, sir.

I went in at the front door of the bank and went out of the front door. The parties were in behind the counter. Mr. Howard was in the bank at this time. This was only a short time before he brought the check to us; think that was *on* the afternoon of the 12th day of January. I am somewhat aquainted with W. A. Wilkes. Mr. Wilkes did not appear before the county commissioners on the 12th day of January. I think he was in the room late in the afternoon, after the board adjourned, either the 12th or the 13th; I will not be positive. He didn't make any communication of any kind to the board with reference to this check on the 12th. He never made any statement of any kind before that evening. At the time we took this check we didn't have any question that there was anything wrong or claimed to be wrong about it.

Cross-examination by Mr. WILKES:

I do not think I was in the First National bank more than once on that day that Mr. Howard got the check; that was at the time that Mr. Howard brought the check to us. Mr. Howard did not return with me from the bank. I did not go with him there; he went there shortly before me, and I did not overtake him until he got inside of the bank. I told him this and went right back. I think that was a trifle before 4 o'clock. When Mr. Howard brought the check up to us I think he laid it down on the table. The entire board was there at the time. Mr. Wright was also there, and I think Mr. Bailey, but I am not positive. The check was examined by the different members of the board, and then referred to Mr. Wright, the county attorney, and it was pronounced good by
158 him—pronounced as equivalent to the cash or currency.

I could not say what was done with the check. I do not think there was any action taken by the board concerning the check that evening. I think the board counted the money and the drafts that afternoon before Mr. Howard brought the check to us. We knew the amount of the whole thing after he brought the check up to us. We made a computation of the amount. After that was done I think Mr. Howard's bondsmen took charge of the money, drafts,

and check. The funds were kept in a little tin box. I am not positive whether the bondsmen took charge of it that evening or Mr. Howard. It was in Mr. Howard's control until it was turned over to the bondsmen. The county commissioners turned it over to the bondsmen for the reason, in the first place—the main reason was the principal bondsman, J. B. Young, had left the county and gone to California; J. B. Young had justified for $50,000 on that bond, and he had left the country, and that made Mr. Howard, as county treasurer—his bonds of no security, and we required additional bondsmen from Mr. Howard, and while Mr. Howard was furnishing these additional bondsmen the funds were turned over into the hands of the bondsmen of C. K. Howard. I do not remember whether that action concerning the bond was taken by the board on the 12th or not. I am not certan. The records show correctly. That was the reason the board turned over the funds to the bondsmen. I am not positive whether they turned them over that evening or not. It is my impression that they took possession of the funds that evening, but I am not positive about that. My memory is very poor as to this. When Mr. Howard came before us with this check and this money and made this showing we considered that he had made a fair showing as county treasurer. The reason we had in tak-
159 ing possession of that money was the reason that I have stated. The bondsmen petitioned to be released; am not positive whether their petition was made the evening of the 12th or prior. There was a petition in from the bondsmen, but I do not know whether it was that evening. I think it was a little before that—perhaps before that day. I think the petition came in on that day or very near that day. I do not know *where* the check was taken from the place where it was given to us on the evening of the 12th. The board felt that the county was not secure, as one of the bondsmen had gone away. We talked it over somewhat that evening.

Q. And after you had counted the money you say the money and the checks were not given back to Mr. Howard at that time. Did you state that or did you not?

A. I don't think I stated.

Q. Was it or was it not?

A. Given back to Mr. Howard?

Q. Yes, sir.

A. I don't think it was given back to Mr. Howard; it was turned over to the bondsmen.

Q. The check was not given back to Mr. Howard any time by the board and the money also?

A. I don't know for certain.

Q. Don't you know whether or not Mr. Howard had that or not after that time—had possession of the check after he presented that to you on the evening of the 12th?

A. I don't remember who took charge of it that evening. I think it was on the 13th it was turned over to the bondsmen; I am not positive. The funds were turned over to the bondsmen by resolu-

tion of the board. They were turned over to the bondsmen
160 just during the time that Mr. Howard should get additional freehold bonds.

Q. Now, you thought, then, you would turn it over to the bondsmen and require Mr. Howard to give some further bond, did you; that is your idea, was it?

A. That is what we done.

Q. You thought Mr. Howard's securities insufficient?

A. We did. We talked with some additional counsel besides Mr. Wright, the county attorney, before we passed this resolution turning the money over to the bondsmen.

Q. Who was it?

A. Mr. Keith and Yount—Mr. Keith, rather; we went to his office. His office was over the Sioux Falls National bank.

By Mr. KEITH:

Q. Mr. Thompson, counsel have asked you about coming to my office for counsel; do you mean to be understood that you came to my office for counsel in regard to this check or anything connected with it?

A. No, sir.

JOHN MCKEE, called and sworn in behalf of the plaintiff and examined by Mr. KEITH, testified as follows:

I am chairman of the board of county commissioners of the county of Minnehaha. I remember the settlement of Mr. Howard as county treasurer in January, 1886. Mr. Howard presented to the board a bank book from the First National bank, which we examined.

Plaintiff read to the jury a portion of the deposition of C. K Howard in regard to the bank book as follows: "I have looked for the bank book which I presented before the county commissioners, as I have stated, but I could not find it. I have made a
161 thorough search for it and do not think it can be found. My impression is it was burned up with other books and papers about the time I removed from the treasurer's office."

Mr. MCKEE (continued testimony):

I examined the bank book of Mr. Howard.

Q. What did it show as the amount of the assets he had at the First National bank belonging to the county?

Defendants' counsel objected for the reason that it has already been shown that the board of commissioners didn't deal with the bank book or place any reliance upon it for the purpose of settlement with Mr. Howard.

Objection overruled. Defendants' counsel duly excepted.

WITNESS: If I remember right it showed a credit of somewhere about $15,000 or $16,000 *dollars*. I examined the book to see. We would not accept the settlement; we would not take the bank book, and told him we had got to have something more definite than the

bank book. He then went back down to the back and brought up a slip of paper (Exhibit "B" in this case that I have heard read). They passed it over to me and I examined and read it and passed it over to the district attorney, who said it was only a letter of credit and told Mr. Howard that we had got to have something more definite than that. He then went down to the bank again; this was along in the afternoon, I should judge, before banking hours closed. There was some talk that we had better hurry up in the settlement or the bank would be closed. Mr. Howard stated that he would bring a check from the bank. (Witness shown check.) I believe that is the check that he brought up. When he brought the check I looked at it and passed it to the district attorney, who said
162 that as soon as Mr. Howard would endorse that check it would be as good as money. The board received it the same as money. I am acquainted with W. A. Wilkes. He did not appear before the board on the 12th of January, the date at which this check was presented by Mr. Howard, that I saw. The board did not have any communication with him at all on that day in regard to this check or otherwise. Mr. Wilkes never at any time came before us as a board of commissioners and notified us that there was anything wrong about this check.

Cross-examination by Mr. WILKES:

Q. About this matter of coming before the board, don't you remember, Mr. McKee, on the 13th of January, the day following the evening when that check was brought to you, of me being before the board when the whole board was there at the table and told you not to take into consideration in anything you might do this check as representing the money?

A. No, sir; you never said a word about the check as I remember.

Q. What did I come before you for?

A. That is what I asked the other members of the board after you went out.

Q. Didn't I state any reasons for my coming there?

A. As near as I could gather from the conversation, you said the board had no right to turn the money over to the bondsmen; but so far as the check was concerned, I don't remember anything said about the check. The check wasn't mentioned, it was simply the question that we had no right to turn it over.

Q. I was there simply to urge you that you hadn't no right to turn it over to the bondsmen?

A. That is what I remember.

163 Q. That is all I said?

A. Yes, sir.

Q. Then I was there before you; I talked to you there?

A. Yes, sir.

Q. I understood you a moment ago — I wasn't there at all?

A. Not in regard to the check.

Q. Mr. Keith asked you if I was there at all, and you said no.

A. In reference to the check.

Q. Did you as county commissioner take advice of Mr. Keith in regard to this matter?

A. Well, yes; I took advice of Mr. Keith and some other lawyer besides.

Q. Why did you take advice of Mr. Keith and not of Mr. Wright, the district attorney?

A. We had his advice, too.

Q. Did the advice of Mr. Wright agree with that of Mr. Keith?

A. On some points.

Q. Did it agree in regard to the matter of this disposition of this check?

A. I do not think I asked Mr. Keith's advice in regard to this check; we examined the check when Mr. Howard brought it before us on the afternoon of the 12th. I do not know as we did anything more concerning it. Mr. Wright told Mr. Howard to endorse the check and when endorsed it would be as good as money; I won't be positive whether I or some other member of the board asked him to endorse it or not. It was either some member of the board or Mr. Wright. I won't be positive. Mr. Howard was asked to endorse the check because of the opinion of Mr. Wright that as soon as the check was endorsed it would be as good as money. I do not know what was done with the check that afternoon. I could
164 not state positively whether it was endorsed that night or the next morning. We did not do anything as a board concerning the check that evening. My remembrance is that after Mr. Howard brought in the check we adjourned right away until the next morning. Mr. Howard took the money and currency that he had in a tin box that evening. I do not know whether he took the check or not. I won't be positive. Mr. Bailey was there that evening. The bondsmen put in an application to be released from the bond. I would not be positive whether that evening or the next morning. I cannot remember whether Mr. Bailey presented an application to be released from the bond that evening or not. Mr. Howard was before us on the next morning, the 13th. I believe the bondsmen of Mr. Howard were there also. I think Mr. Hollister and Mr. Bailey were there. If I remember right this money was turned over to the bondsmen that morning. I think Mr. Hollister took possession of it. It was right there on the table.

Q. Who turned it over to them; by whose authority did they take it?

A. Well, Howard had possession of it until they got possession of it.

Mr. Howard turned it over to their possession by order of the commissioners. The box of money and the check were all there together on the table. Mr. Howard had control and custody of them until they were turned over to the bondsmen. I do not remember of meeting Mr. Wells on the morning of the 13th of January and of his warning me not to take this check in suit because the bank would not pay it, and that Mr. Howard had diverted it from the purpose for which it was issued.

(Defendants' counsel reads to witness resolution passed by the board of commissioners January 13th.)

165 WITNESS: I think that resolution is a correct statement of the facts concerning that matter.

Q. At the time that Mr. Howard presented this check and the money on the evening of the 12th Mr. Howard stood fair before you, the board of county commissioners; you had no objection against him as to his being behind with the county funds or otherwise?

A. That is, as far as Howard was concerned, we deemed his bondsmen unsufficient.

Q. Had you known as a matter of common repute, prior to this time, that Mr. Howard was behind in his account with the county?

Plaintiff's counsel objected as hearsay, incompetent, and immaterial what was the repute.

Objection overruled. Plaintiff's counsel duly excepted.

A. I had heard it before election time, that he was behind, but at that time the money was right there before us.

PLAINTIFF'S COUNSEL: We now renew our motion that the court direct a verdict for the plaintiff. We will call Mr. McKinney.

C. E. MCKINNEY, called and sworn in behalf of the plaintiff and examined by Mr. KEITH, testified as follows:

I am president of the Sioux Falls National bank. I think it was organized in December, 1882 or 1883. In January, 1886, the bank was located in a building facing west on Phillips avenue, in a room 22 feet wide. As you went into the front door of the bank the counters began on the left near the door and went down to a partial partition running from the side of the room to the vault. This
166 partition was about 7 feet high; there were no doors in it, but open archways, one on the outside and one on the inside of the counter that divided the front room as we termed it into two parts—the front room where we handled cash and the general business of the bank and the rear room where we transacted the business of the directory, real estate, and other business. Behind that was a full partition with a door in the center opening into a rear room which we used as a store-room. Depositors of the bank frequently came in the rear door to make their deposits. Some didn't come in any other way. This rear door of the bank was about 30 feet from Eighth street. At the time the deposit of the county funds was made by the bondsmen I think Mr. Hollister, Mr. Coats, and Mr. Corson came to the bank; also Mr. Curry, Mr. Norton, Mr. Bailey, and myself were present. When they came into the bank I was busy in the front part, our banking-room. I do not know as a matter of personal knowledge which way they came into the bank. When I first saw them they were in the rear part of the front room—that is, what we called our directors' room and real-estate office. As I came into the room and saw them there Mr. Hollister was standing by an upright desk along the side of the room. He said, "I

have brought you a deposit. I make it about so much. You count it over and see if I am correct." As he said that he turned out the money. It was composed of bills, silver, gold, and checks. I began counting the money. Mr. Curry came in at that time and I said to him, "Please help me count this deposit." We counted the deposit and as Mr. Norton came in I called to him and said, "Make out a book for this deposit," and he went and got a book and asked in
167 whose name to make it out and either Mr. Bailey or Mr. Hollister said, Make it in the name of Hollister bondsmen, as bondsmen. After I counted the money Mr. Curry took it and put it in the front room on the counter where the telling was done and the credit was given. I think Mr. Norton brought back the book and handed it to Mr. Curry and I think Mr. Curry made the credit and handed it to Mr. Hollister and the bondsmen left. We took up the money and put it on the teller's desk. (Witness shown check in suit.) This check was a part of that deposit. I think that Mr. Curry checked up the checks and I was counting the cash. After he finished that he assisted me in counting the money. I ran the checks over and I think as I came to this I said, "This is a good, nice check, a good-sized check," and Mr. Hollister said, "Yes." I said, "That is a good check." He said, "We regard them as cash," and I said, "Certainly." He said, "I want this deposit as cash," and I said, "As far as I see I don't see any reason why not. We consider it as cash; we regard this as cash." We had before this time received cashier's check of this same bank and treated them as cash. They had always been paid on presentation.

Defendants' counsel moved to strike out testimony as to how he treated cashier's checks.

Motion denied.

Defendants' counsel duly excepted.

I had no knowledge or information from any of these parties that there was anything claimed to be wrong about that check at the time we received it. There was nothing said by any of them with reference to it. I did not have any knowledge or information from any source that there was anything wrong claimed about this check. I heard the testimony of Mr. Schaetzel in reference to the conversation which he claimed to overhear.

168 Q. I will ask you, sir, whether you had any such conversation in the Cataract on the 12th day of January, 1886.

A. No, sir; I did not.

Q. On the 13th day?

A. No, sir; I did not.

Q. Did you have a conversation with Mr. Corson with reference to this matter later on?

A. I did the next day.

Q. What was the occasion of that conversation?

A. I asked him to go on the attachment bond, which he did.

Q. That was in the Cataract house, was it?

A. Yes, sir.

Q. Was it the 14th?

A. Yes, sir. I do not think I had any conversation with Mr. Corson on the 13th with reference to this check; it was one of our busy days. I do not think that I knew anything about this check at that time. I do not think I had as much as heard the check mentioned at that time. I heard Mr. Hollister's testimony. I don't think I asked Mr. Hollister to endorse any checks or drafts; those that were made payable to C. K. Howard, as county treasurer, are not endorsed at all; he said they were in charge of the funds of the county treasurer and "I ought to have a right to endorse for Mr. Howard," and, I think, he did endorse in the name of C. K. Howard; that was the extent of it; if he did anything more than that he was not asked to.

Cross-examination by Mr. WILKES:

The first time I saw that check was when it came there to be deposited. I do not think it was in anybody's hands when I first saw it; it was lying on the desk. I think Mr. Hollister carried the box and turned it over on the desk; it was a long
169 desk.

Q. You say Mr. Hollister stated they were in charge of the funds of the county treasurer?

A. Yes, sir; had charge of the funds while he was getting his bonds. I suppose he claimed to deposit these funds in the character of bondsman; that is the way the deposit was made out. I simply inferred from that.

Q. Simply as bondsman in custody of the funds of the county treasurer; that is the way you understood it?

A. I think that is the way, as I remember it now. There were other checks with this one on various banks of the city; probably some ten or twelve. It was customary for quite a number of our depositors to come in at the back door; the back door opened out onto a platform leading to the public highway, Eighth street. There was a vacant space of ground running north and south by the rear door of the building, which allowed teams to come in with goods down to the stores. I do not know as you would call it a public highway; it was a road that was traveled. It is not a fact that this back door opened almost on the river bank. There are several buildings, one or two, between out-building and the river. Our bank was in the building on the corner of Phillips avenue and Eighth street. The building was 44 feet wide and we had the inside 22 feet. In going south from the back door of our bank there was no regular street, but there was a vacant space between the building and the river from 50 to 100 feet wide that was used by teams in delivering goods to the rear of the block. There were a few outhouses back of the building in this block. The back room of our bank was not occupied as an office; it was a sort of vacant room where we sometimes put boxes or something of that kind. I do not remember
170 whether the platform extended farther south than our building or not. The Dakota National bank was located in the same block south as ours was north. I did not see these parties

when they came into the bank. I was in the front part of the front room.

Q. And that is the room where the usual banking business is transacted?

A. Really our directors' room and our tellers' room was all one, simply separated by this slight partition that has been referred to. It was in the directors' room where I met these parties. I think Mr. D. R. Bailey called me into that room. He was in the front part of the front office, right near the door, when he spoke to me. He said, Step into the back room. When I went in there Mr. Hollister first spoke to me concerning this deposit. As I stated before, he said, "I have a deposit here for you." He said, "I make it about so much; you count it over and see if I am correct," and dumped the money out on the desk and I began counting. I assisted in counting the deposit. I do not think any one showed me this check of $16,000. I think I picked it up lying with the other checks on the desk as I run them over. I think I was talking with Mr. Hollister. He stood at my right. I think I said, "This is a nice check, a good-sized check." So far as I know there were two or three of the checks that were not endorsed. They were not endorsed by the bondsmen, I think. I did not ask any one to endorse these checks except in the case of perhaps two or three that were not endorsed by Mr. Howard.

Q. Was it your custom to require the endorsement of checks deposited to the account of a depositor?

A. Well, it depends upon what shape they were in. If a man brought in a check that was drawn to the order of the party we
171 would require the party's endorsement to whose order it was drawn, but if we knew all the parties to the check and either party brought the check in we did not require the endorsement, and where the checks were made payable to bearer we did not. As a general rule we did not require endorsement of checks of that kind. I did not think it was necessary to have an endorsement of this $16,000 check when it was brought to us by these men and deposited. I knew all the signatures at the time and we regarded the check as good as cash. There was no talk between me and Mr. Hollister and any of these bondsmen concerning their endorsement of the check of $16,000 at the time it was taken on deposit; nothing whatever said about it.

Q. Did you claim that these persons who made that deposit were in anywise responsible to you upon that check?

Plaintiff's counsel objected as incompetent and immaterial; calls for a conclusion.

Objection sustained. Defendants' counsel duly excepted.

I did not ask these parties for any arrangement of indemnity in case we did not get the money on this check. I do not think we ever did at any time. We certainly didn't at that time. I did not go to the depositors after I presented the check to the First National bank and it was not paid and talk with them about it. I do not remember that I ever talked with them about making the check good to us. I have no recollection of ever going to any individual

one of these depositors after payment was refused and ask them to indemnify us for the check or to take it back. I didn't have any conversation with these depositors within a day or two after payment of the check was refused and pending the commencement of the suit or talk with any of them concerning the rescinding of the deposit. We did not charge the check back to them on the
172 books of account of our bank. Up to the time this suit was commenced we had paid out money on that account.

Q. Did you ask these depositors or any of them if payment had been refused before you took it?

A. No, sir; I don't think we did.

Q. Did you inquire if it had been presented for payment?

A. I did not.

Q. You did not.

A. No, sir.

Q. You are entirely certain of that?

A. Yes, sir; I do not think that any of the persons who made this deposit had at that time any standing account with us, and we had no account with them as bondsmen prior to this deposit. There was an entirely new account opened at the time this deposit was brought there. I did not know that the check had been presented for payment on behalf of the bondsmen before they brought it to our bank for deposit. I learned before the commencement of this suit—I think the evening, probably, of the 13th, when you were down to the office—that the check had been presented, and I also learned that it had never been absolutely refused. I knew when Mr. Norton presented it as cashier and demanded payment, but I did not know that it had been refused to the bondsmen.

Q. Did you consider these men leaving this check there, as a matter of fact, practiced any fraud or deception upon you in getting this check and making that deposit?

Plaintiff's counsel objected as incompetent and immaterial, and calls for a conclusion.

Objection sustained. Defendants' counsel duly excepted.

173 Q. Did the bondsmen practice any fraud on you when they gave you this check?

Plaintiff's counsel objected upon the same ground as the last question.

Objection sustained. Defendants' counsel duly excepted.

Q. What did you consider were your rights, Mr. McKinney, concerning this check as to returning the same to the bondsmen after you learned that payment had been refused on the check?

Plaintiff's counsel objected *to* as calling for a conclusion and a question of law.

Objection sustained. Defendants' counsel duly excepted.

—. None of the officers of our bank went to see these bondsmen or any of them concerning the return of the check after it was refused payment that I am aware of. I gave no instructions. I think the

money that was paid out by us on this deposit was paid out all at one time and on one check, but I am not certain; our books will show. I think there was nothing paid out on the account, this deposit account, prior to January 19th. I knew before January 19th what Mr. Wells and Furbeck claimed to be the circumstances concerning the issuance of this check by Mr. Furbeck. I did not know whether they were true or not; I think Mr. Hollister was the first one who spoke to me about taking this deposit made by the bondsmen; that was about half past two or three o'clock in the afternoon of January 13th, the time they brought it there for deposit. I think I had some conversation with D. R. Bailey prior to that; it was right after dinner; I was sitting in the directors' room, where I could see into the teller's desk. I think Mr. Bailey dropped in and I gave him a cigar and asked him where he had been the last two days; he said he had been busy, I think engaged in
174 behalf of the bondsmen of C. K. Howard, getting out on the bond; that J. B. Young had left and they wished to be released and that that office had been turned over to the bondsmen with the money. I think I then inquired if they proposed to keep the deposit in the First National bank. He said they thought not. I asked him if he knew where they proposed to deposit, and he said he didn't. I said, We would like the deposit; we want to get it, and I see no reason why Mr. Hollister had not just as soon deposit with us as with any of the other banks. I think that was the substance of this conversation. I might have asked how much the deposit was, or the amount of the funds that were turned over; if I did, I think he told me. Mr. Bailey did not show me a list of what the deposit consisted of. He may have pulled out a piece of paper. I am not certain whether he made any statement concerning the deposit or not. He may have mentioned the fact of there being a cashier's check among the deposits. I don't remember whether he did or not; I was called into the other room, and while I was in there he left. I do not recollect of Mr. Bailey's being in the bank more than once that day before they brought in the deposit; he may have been. It was one of our busy days. Nelson Bailey, a son of D. R. Bailey, was employed with us some time after that—I think some two or three weeks. After learning that this was county money I did not go to see the commissioners or any of them about it, nor did I have any consultation with them in regard to the check.

Q. Did you see their resolution transferring the money to the bondsmen?

A. No, sir; I don't think I have seen it. I don't know as I ever heard of it until I heard it read to-day. I have heard of it, but I don't think I ever heard it read until to-day. Up to that
175 time I had received over our counter on deposit many drafts of larger amounts than this one in question. They are not a common occurrence, but a frequent occurrence.

Q. Didn't take such checks as that without an endorsement by the depositor?

A. If we knew the parties and knew the signatures we considered it enough.

Q. Did you ever take one of that size without endorsement?

A. I do not remember.

Q. By the depositor?

A. I don't remember any circumstance of that kind.

Q. Did your board of directors of your bank have a meeting concerning the taking of this check on that deposit?

A. We had no official meeting; no, sir. The majority of the directors were seen. I do not know as we had ever before taken a deposit of $2,700 in a tin box through the back door of the bank. We would have been glad to have taken a good many through the back door or through the window, I think. John McClellan is one of our directors.

A. Isn't it a fact that Mr. McClellan, one of the directors of your bank at that time, was opposed, and so stated, to your taking this check?

A. No; I do not remember whether C. L. Norton was cashier of our bank on the 19th of January, 1886, or whether he had resigned, but my impression is that he was cashier on the 19th. It was not one of the conditions or a part of the arrangement of our taking this deposit that Mr. Norton should be made county treasurer of Minnehaha county in place of Mr. Howard. I never heard anything about it.

Cross-examination by Mr. McMARTIN:

176 Q. Mr. McKinney, do I understand you to say positively you knew nothing about this check at the time you took it; you knew nothing about it—that is, the way in which it was issued?

A. Why, I certainly did not know anything about the way in which it was issued. If I knew anything about it, I supposed it was issued in the usual way. I do not remember whether I sent for Mr. Hollister the next day after we presented this check to the First National bank or not. I do not remember whether he was in the bank the next day or not. I knew he was in Keith's office. I learned that from Mr. Keith or some other source. I may have been in Keith's office about the time the bondsmen were in that part of the building. I don't remember what was said in that conversation. I know I was talking with Keith in regard to this suit. I didn't hear any conversation in which the expression was used "keep clean sheets so you can go into court and testify." At the time this check was received by us—I cannot say that I knew it had come from the county treasurer. I might have supposed the check came from the county treasurer. It was endorsed in his handwriting, and I probably knew it from that fact, if from no other. I was not at all acquainted with Howard's financial condition.

Q. Is it not a fact there was a rivalry between your bank and the First National bank?

A. Simply a natural rivalry to get business. The same as there is in all banks. Mr. Hollister and I were always on the best of terms that I remember of. I do not remember any instance in which we had any difficulty.

ARTHUR L. CURRY, called and sworn in behalf of the plaintiff and examined by Mr. KEITH, testified as follows:

In January, 1886, I was assistant cashier of the Sioux Falls
177 National bank. I was not in the bank when the bondsmen came there with the deposit; I came in while they were there and saw Mr. McKinney engaged in overlooking the funds. He asked me to help him count it, and I did so. After they were counted we carried them into the front room, and, as I was acting teller at that time, I proceeded to put it on the books. I have the books here. (Book shown witness.) This is a book of first entries. It is the cash book of our bank used at that time. It shows the entry of this deposit made in my handwriting. I made it at that time. At the left we put down the name of Hollister and bondsmen and charged cash $27,236.63 and credited the account to the deposit. (Book shown witness.) This book is an individual ledger used at the time this money was checked out. It is a book of original entry.

Q. What time was this money as testified to checked out by the bondsmen?

Defendants' counsel objected on the grounds that it has already been proven by the records and it is not necessary to show by Mr. Curry and it is immaterial and irrelevant as having been paid out after the suit was brought.

Objection overruled. Defendants' counsel duly excepted.

A. January 19th, 1886. (Bondsmen pass book above set forth shown witness.) That is what we call a pass book. It was made on the occasion of that deposit. The entry is in my handwriting. I made it at the time for the purpose of giving them credit. I was present during all the time this money was counted and participated in the counting. Mr. McKinney was assisting me, and Mr. Hollister was also checking over some part of it. Nothing was said by any of the
178 bondsmen or anybody else there present about this check having been presented anywhere, or that there was anything irregular about it in any way, shape, or manner. I never saw or heard of this check until this time when it was brought there for deposit. When we received the check we gave them credit for it as cash. I heard the testimony of Mr. Hills in regard to the conversation he claimed to have with me at some railroad meeting. As I had no knowledge at that time of the existence of the check I had no conversation in relation to it. I frequently had conversation with Mr. Hills, and I apprehend that he is mistaken as to the time. I might have had that conversation, but I had no conversation at that time with him on that subject. I did not know at that time that the bondsmen were trying to be released, nor did I know that the check was issued. Mr. Hills must be mistaken as to the time.

Cross-examination by Mr. WILKES:

I have no recollection of meeting Mr. Hills *on* the evening of the 12th. I am unable to state whether I was at that railroad meeting or not. I do not remember whether there was a

railroad meeting. I do not know whether I met Mr. Hills on that occasion. I could not have spoken to him about this check, for I could not have spoken of what I did not know, and I knew nothing of the check. This check that was deposited with us was credited as cash. It was not stated and particularly mentioned that this was to be taken as a cash item. There was nothing said to me about it. I was acting as clerk, as teller, and the custom was to credit these items as cash. There was nothing said in my hearing concerning the taking this as cash. This deposit was taken in the usual, ordinary course, just the same as other deposits. If checks were brought in by the party to whom they are drawn we should require an endorsement; if they were not
179 brought by the party, the payee or drawer, it depends largely upon the check whether we would require an endorsement of the party bringing it. We were perfectly familiar with every signature on this check. It is not our invariable rule to require endorsement. This is a case where we did not require endorsement. It is a case where we were acquainted with the signature on the back of the check. We were satisfied to take it from any other party simply on the endorsement on the back of it. We considered that Mr. Howard had assigned his interest in it to the holder of the check.

Q. Whom did you consider the holder of the check?

A. We were to become the holder of it. That was what I was interested in.

Q. Interested in getting hold of the check?

A. Yes, sir; as a deposit.

We customarily followed the law concerning the protesting of endorsed paper.

Redirect examination by Mr. KEITH:

Q. Had the Sioux Falls National bank, before this time, taken cashier's checks from this same bank—the same kind of a check as this?

Defendants' counsel objected. Objection overruled. Defendants' counsel duly excepted.

WITNESS: We had handled such checks before.

Q. How did you treat them?

A. As cash.

Q. Always.

A. Yes, sir; always.

By Mr. MCMARTIN:

Q. Were they taken without endorsement?

180 A. Well, sir, I could not say how they were taken.

Q. What is your memory in regard to that, Mr. Curry?

A. Well, I assume they were in proper form.

Q. You mean properly endorsed?

A. I assume they were.

Testimony closed.

Plaintiff now renews its motion and asks the court to direct a verdict in favor of the plaintiff upon the grounds heretofore made when defendant- rested, to wit:

1. The undisputed testimony shows that the check in suit was issued upon a valuable consideration to C. K. Howard, for him to use as cash in making his semi-annual settlement with the board of county commissioners.

2. The undisputed testimony shows that the county commissioners received said check from Howard the same as cash on his settlement and with the check and money that Howard had on hand, all amounting to about $27,000, made full settlement as county treasurer with the county commissioners.

3. That upon the request and demand of the bondsmen of said Howard the commissioners turned over to them all of the funds of the county received from Howard, including this check, and put the bondsmen in charge of the office of county treasurer.

4. That the bondsmen took said funds, including the check, to plaintiff's bank, and the same were received by plaintiff and deposited as so much cash to their credit.

5. That the undisputed testimony shows that the plaintiff received said funds, including the check, without any knowledge of any infirmities, if there were any, attached to said funds, including the check, and without notice that there was anything claimed to be wrong about the same.

181 The COURT: It is a fair inference from the testimony, and it seems to be admitted, that Howard was short in his accounts and in his settlement with the county perhaps in the sum of about $16,000, and on the 12th day of January the First National bank issued this check, and if in good faith, legitimately, and the law would presume it was done legitimately, although there is some evidence that it was not, then this check was good, and there could be no defense to it. If it was issued illegitimately and for the purpose of deceiving the county commissioners and to aid Howard in his settlement, they are not in a position to defend against it. The case stripped of the husks that surround it is very simple and all the material facts uncontradicted. There is no evidence, even admitting all the defendants' testimony, that the plaintiff had notice of any irregularity in the issuance of the check or that there was any defense to it in the hands of any one until the evening of January 13th. If the plaintiff had the right to charge it back it was not bound to do it and did not do it, but elected to pursue its remedy against the defendant-, as it had a right to do.

Which motion was granted by the court.

Defendant's counsel duly excepted.

The court thereupon directed the jury to return a verdict in favor of the plaintiff and against the defendant- for the sum of $18,247.14.

To which order of the court directing said verdict defendants' counsel at the proper time duly excepted.

Defendants give notice that they will move for a new trial.

Defendants except to the direction of a verdict for the plaintiff by the court upon the following grounds:

182 That the facts and circumstances surrounding the taking of this check are such as to warrant the jury in finding for the defendant, and that the matter should be submitted for their determination. On the further grounds that the plaintiff was bound to take notice of the several defences shown in this case for the reason that the check is drawn to the treasurer of Minnehaha county, and is trust funds, and was so known by the plaintiff at the time of their acquisition of the paper; that the commissioners had no power to accept a check in lieu of money and no power to deliver the same to the bondsmen even if accepted, and any person taking the paper would from these facts be presumed constructively to know of the equities and would take but an assignment of an equity. If it is shown to be a loan it is beyond the power of a bank to make such a loan, whether considered as a loan of an equity or an ordinary loan as being in excess of 10 per cent. of the amount of the capital stock; that the commissioners having no power to accept checks in payment of taxes or any settlement of the treasurer's account, the bondsmen could only be credited to the amount of its collection, and the commissioners have no power and could not accept or impart life to negotiable paper.

(Endorsed:) In district court, Territory of Dakota, county of Moody. The Sioux Falls National Bank, plaintiff, *vs.* The First National Bank of Sioux Falls, Dakota, and J. Leslie Thompson, as receiver, &c., defendant. Bill of exceptions. Wilkes & Wells and Boyce & Boyce, att'ys for def't bank. T. B. McMartin, att'y for def't, receiver. Filed at — o'clock — m. on Apr. 27, 1883. James Wilson, clerk of the district court, Moody county, Dakota. Supreme court of the Territory of Dakota. Filed Sep. 27, 1888. J. H. C. Young, clerk.

183 TERRITORY OF DAKOTA, } *ss*:
*County of Moody*, }

In District Court, Fourth Judicial District.

THE SIOUX FALLS NATIONAL BANK, Plaintiff, *vs.* THE FIRST NATIONAL BANK OF SIOUX Falls and J. Leslie Thompson, as Receiver Thereof, Defendants. } Motion for New Trial.

Now come the defendants and in pursuance of their notice of intention heretofore given move the court to vacate and set aside the verdict rendered in the above-entitled action and to grant a new trial therein on the following grounds, to wit:

I.

Insufficiency of the evidence to justify the verdict, in this:

First. The evidence is insufficient to sustain the verdict in that the evidence shows that the check in suit was never legally issued by and never became a valid obligation of the defendant bank. The following is all the evidence on that subject:

Testimony of C. K. Howard (p. 145–139):

Was county treasurer of Minnehaha county about thirteen years. From the time of its organization I kept my deposit as county treasurer with the First National Bank of Sioux Falls. J. B. Young and H. L. Hollister were respectively the president and cashier up to the year 1885. In December, 1885, R. J. Wells became president of the bank. Some time before that W. F. Furbeck succeeded Hollister as cashier. Wells and Furbeck continued as officers of the bank up to the time the receiver was appointed. I made my settlements as county treasurer with the county commissioners in January and July of each year.

184 I had an arrangement with the officers of the First National bank to furnish me funds to make my settlement with the board of county commissioners in January, 1886. It was the understanding with the old management of the bank—with Mr. Young as president and Mr. Hollister as cashier—that they were to sustain me in the business which I was interested in and in some matters in which we were mutually interested. When I learned of Mr. Young's retirement from the active management of the bank I went to him and asked him if it was going to make any difference with my being sustained there as I had been theretofore—sustained as county treasurer—and it also applied to our general business, in which we were mutually interested. I told him I understood he was going away, and if he went away without leaving any explanation of this matter it would place me in a very unfortunate condition, and I would like to know definitely what I could depend upon. He stated to me he had talked with the management as it now existed, and had made such arrangements that I would be protected. I asked Mr. Wells if Mr. Young had talked with him about my matters, and he said he had, and that they would help me out. This was a few days before my settlement. There was nothing particularly said about the settlement any more than they were to assist me in my settlement. I think Mr. Furbeck, the cashier, was present. I talked with them together about it and also separately. I told them I thought it would take about $15,000 to make my January settlement with the county commissioners. They carried the idea to me they would help me out. I asked Mr. Furbeck what would be necessary for me to obtain the proper credit to show the commissioners. My recollection is that I proposed to Mr. Furbeck to give a note for that amount. He said it would be

185 better for me to make some drafts to cover that much credit.

I had had considerable business with M. D. Stevers & Co., of Chicago, and had very frequently made drafts on them, which of

course had been honored. He suggested that I make drafts on Stevers to cover this amount. I told him that I could make drafts, but I had not the proper credit there which would obtain the payment of them. He said that would place his books in proper shape and he would charge it back to me in time; wanted to have the matter in a businesslike way—show a businesslike transaction—and keep his books straight. I think the drafts would not have reached here before the time to make my settlement with the county commissioners. This conversation occurred a very few days prior to the date of the settlement. I made the drafts; my recollection is I made one for six, one for four, and one for five thousand dollars. I think I made them on separate days. After making the drafts I deposited them to my credit in First National bank—that is, to the credit of Minnehaha county, C. K. Howard, county treasurer. That is the way I had kept my account at the bank—C. K. Howard, county treasurer. At my settlement with the commissioners in January, 1886, I appeared before the board with my books and vouchers and we settled up. There was a balance due the county up to the first of January of about $27,000. I also had in my hand several thousand dollars, which I afterwards turned in. I had cash on hand for the amount due the county, except this check; the amount less some fifteen or sixteen thousand dollars. I had this money before the board at the time in question. I had the money in connection with the bank book. The bank book was written up in the bank by some of the officers of the bank and handed to me by some of the officers; I think Mr. Furbeck or
186 some of the clerks. I haven't that book. I showed the bank book to the county commissioners. They said no doubt that was all proper, but they would like to have some little further assurance that I had the stuff—the money. I then went down to the bank and told Mr. Wells and Mr. Furbeck that my settlement was all satisfactory and my books were all checked up and everything was perfectly satisfactory so far as the settlement was concerned, except the fact that the commissioners wanted some more conclusive evidence that I had that much money. If my recollection serves me, Mr. Wells gave me a letter and made a statement to the board to that effect—that is, that the books of the bank showed that I had as county treasurer a credit to Minnehaha county of so much money—fifteen or sixteen thousand dollars. I showed the statement, which Mr. Wells gave me as president of the bank, to the commissioners. I don't know what became of it. My recollection is that the commissioners said that was getting a little nearer bed-rock, but they would like a certified check. I then went down and got one. (Check shown witness.) That is the fellow, as near as I can remember. As near as I can remember, what was said by Wells and Furbeck was simply this: There was a check that they thought would answer my purpose and would aid me, assist me or sustain me in perfecting a settlement with the board. I told them that the commissioners requested of me a certified check. That is my signature on the back of the check and is in my handwriting. I turned the check over to the commissioners in settlement—enough to make, with the cur-

rency, $27,000; as near as I can remember, to the board of commissioners of Minnehaha county. They were in session at that time. It was their semi-annual meeting. It was
187 counted with the other funds I had on hand to make the required amount which I needed to make the settlement with the county. Mr. Furbeck delivered the check to me personally. I remember when I went there on this last occasion when the check was delivered to me. I wanted to get the money instead of the check. I remember of saying to them, "Of course, if I take the money and that was counted that will be the end of it." There was some talk about money. I remember Mr. Wells said to me that they had the money to give me to make this settlement. I cannot remember why I was not furnished the money or why I took the check, nor the exact circumstances or the conversation. I remember saying to him that the commissioners wanted a certified check. I then went to Mr. Furbeck and stated to him that a certified check was all that was necessary to accomplish this settlement. Mr. Furbeck said, "We do not issue certified checks, but I will give you a cashier's check." That is as near as I can remember. My recollection is that this transaction was quite late in the day. I had been busy all day with my settlement, but I cannot state positively as to the time Mr. Furbeck handed me the check. I went direct from Mr. Furbeck to the board of commissioners. I was a little on the anxious seat myself then and in a hurry. When Mr. Furbeck gave me the check I told him, as near as I can remember, that if they would allow me to straighten up everything I would deposit the check and currency in the morning. I refer to the money that I had on hands which I had retained in my private box in the vault of the treasurer's office until the settlement. I told Mr. Furbeck that no doubt that would complete my settlement, and as soon as I had perfected the settlement I would return the check and also place to the credit of the county
188 what money I had in my possession—some twelve or fourteen thousand dollars. It was the understanding that this check was not given to me to be treated as a valid and binding obligation against the defendant in this suit, but was simply loaned to me as a credit of the bank. The understanding between me and Mr. Furbeck was that I was to return the check in the morning and was to deposit to the credit of the county the money I had in my possession belonging to the county. I remember that I assured Mr. Furbeck when I took the check that I would return the check within twenty minutes; that I would be back in the evening; it would be a very temporary transaction. This money I was going to deposit was money I had in my possession and not money which I took from them. It was an additional deposit. I told him I had about $12,000 or $14,000, which I would deposit in the morning as soon as my settlement was perfected. The understanding was I was to return the check, and I should have returned it if everything had gone through as I expected. I did not give my check upon the bank for the amount of this cashier's check. I went from the bank to the commissioners with the check. The entire board was

there at the time in session. D. R. Bailey was there; also H. L. Hollister and C. G. Coats. They appeared there frequently after my appearance before the board. I had been before the board during the entire session of the board that day figuring up and making my semi-annual settlement and statement. Mr. Hollister, Mr. Coats, and Mr. Bailey were there several times previous to the time when the check was delivered during that day. It was a public meeting, an open session of the board—parties out and in frequently. I do not remember seeing Mr. Keith there during the day. I had trouble enough of my own at that time. I saw these men, except Mr. Keith, there the next morning. Mr. Wright and N. E. Phillips
189 were present when I delivered the check to the commissioners. I handed the check to the chairman of the board. I made the endorsement on the check that evening. It was not endorsed until after I handed it to the chairman and the board had examined it. It was at the suggestion of Mr. Wright or Commissioner Jones—I cannot be positive which—I think it was Mr. Wright—that I endorsed it. I did not take the check back to Mr. Furbeck, as was agreed upon. The reason was the other fellows were a little stouter than I and took it away from me. By other fellows I mean my bondsmen and the commissioners. My bondsmen appeared before the board by their attorney, D. R. Bailey, and made some kind of a demand—I don't remember exactly what—claiming a settlement had been perfected. The funds of the county had been turned over as per our settlement, and they demanded a release from any further action on my bond, and upon this demand—this statement being made by my bondsmen through their attorney—the board took possession of the stuff and deferred action until next morning. This occurred the evening I brought the check to the commissioners. I cannot positively state whether the check had been endorsed or not when that demand was made by my bondsmen. The commissioners took possession of my funds, papers, and effects pertaining to my settlement, which were then presented. They did not give the check and money back to me. I have never had it since. They did not take possession of it with my consent. The check was endorsed that evening. Either the next day or the day following I tendered my resignation as county treasurer. I said to them, of course, if they proposed to run the thing, why, I did not know as they needed any fifth wheel to the wagon. I was present when the commissioners turned this check over to my bondsmen.

190 Testimony of Witness Furbeck, page- 85-96:

Q. Did Howard make any payment for the check or give any consideration for the same?

A. We did not receive any money; we simply received a promise of money. When Howard asked for the check he said he would within twenty minutes bring in money enough to make a deposit. Howard promised that he would within twenty minutes return the check and he would not allow it to go out of his hands and would make a deposit to his credit, a large amount of money besides.

The check was delivered to him on the condition that he would not allow it to pass out of his hands. I did not see him again that evening. He did not return the check; he did not give us his check on anybody or any account as consideration. There was no action taken by the board of directors in regard to the issue of this check either before or after it was issued. The capital stock of the First National bank was $50,000.

*The Statement Ex. "B" Presented by Howard to Commissioners.*

"First Nat. Bank, Sioux Falls, Dak.

JAN'Y 12, 1886.

The books of the bank show a credit in favor of the county of $15,625.01. If you wish you have the privilege of examining the books.

R. J. WELLS, *Pt.*
W. F. FURBECK, *Cash.*"

And the further testimony of Furbeck:

The books showed the county had that amount of money there. The books were true under certain conditions. They did not have that subject to check. Mr. Howard, as county treasurer, kept his account with the First National bank during all the time I was cashier. The statement that the books showed that there was this amount to the county's credit was true, but not that it was a fact that the money was there. The county did not have the money there. He (Howard) was making his settlement with the
191 commissioners at the time that letter was written. Howard came back and asked for a certified check or the cash. I issued this check to him. I thought I knew what he wanted it for, but it appears I didn't. I thought he would take it as he agreed and return it inside of twenty minutes—take it to the county commissioners. I had no conversation with Mr. Howard prior to the issuing of this check with reference to issuing this check.

Testimony of Witness Wells, page- 117-122:

Mr. Howard came into the office of the First National bank on evening of 12th January, about time I was going home, and wanted something to help him out in his settlement with the county. At that time this check was given to him by the cashier upon his repeated assertions and promises that he would keep it in his possession and deliver it to nobody, and that he would return it within a short time, I think within twenty minutes, and that he would at that time bring in a large amount of money that he had. He gave nothing for it and carried it off. He did not give it back. The check was not in any way charged to him, to my knowledge. He came into the bank from the back door through the Cataract house. He stated that he was behind considerably. I did not know before how much it was. He came to the bank with tears in his

eyes and said the penitentiary was staring him in the face and he had to have help. I proposed to let him have money to help him out. He said he had available assets that he could realize on in the next six months and make him square with the county. I believed it, and I don't know but he would have if he had been let alone. Against my judgment I consented to help Mr. Howard, and proposed to give him the money to carry him over temporarily, to help him make his settlement with the county commissioners.
192 My judgment was overruled in the matter, and this check was issued, and he carried it off. The check was not issued in place of money; he had no money there to amount to anything. My proposition was to let him have money as a matter of accommodation to him. Instead of his getting the money he finally obtained this check. He asked for a certified check, but was refused, and this was given. It was given to help Howard make his settlement with the commissioners; that was my purpose. The check was not given for the purpose of showing the commissioners that he (Howard) had that amount of money to his credit as county treasurer.

Testimony of Witness Peck, page 122:

I was assistant cashier of the First National bank in January, 1886. The first I knew of check positively was on the 13th of January, after it had been refused by the bank. The day before that Howard was in the bank several times; the last time was late in the afternoon. When he went out he had something in his hand, which I think was the check, and made the remark to Wells and Furbeck that he would bring it back in twenty minutes.

Testimony of Witness Hollister, page 98–108:

I have lived in Sioux Falls since 1877; was cashier of First National Bank of Sioux Falls up to two and one-half years ago. I know C. K. Howard, and was one of his bondsmen during the last two terms that he served as county treasurer. I was in Sioux Falls in January, 1886, and present at a meeting of county commissioners during their settlement with Howard. C. G. Coats, W. H. Corson, and J. B. Young were on the bond with me at that time. We petitioned the commissioners to be released from the bond and
193 that the commissioners take charge of the money. We made our petition through our attorney, D. R. Bailey, one of the plaintiff's attorneys here. Corson and Coats were there at that time. At that time the funds were turned over to the bondsmen by the commissioners. The funds consisted of checks, drafts, and currency and gold and silver. There was probably seventeen or eighteen thousand dollars in checks of the twenty-seven thousand dollars. This check was included and a part of the funds. We received it January 13th.

Testimony of Witness Schaetzel, page 108:

In January, 1886, I was a stockholder and director of the First National Bank of Sioux Falls. There had been no meeting of the board of directors concerning the issue of this check.

Testimony of Witness Wright, page 112:

In January, 1886, I was district attorney of Minnehaha county. I was present at the court-house on the 12th of January, 1886, at a settlement between C. K. Howard, county treasurer, and the county commissioners. (Witness shown check in suit.) I first saw this check at that settlement about four o'clock in the afternoon of January 12th, 1886. Mr. Howard had it and laid it on the table where the commissioners were at work in the court-house. It was not endorsed when brought there. I did not see it endorsed. D. R. Bailey was present at the time Mr. Howard brought in the check. He was sitting near the table occupied by the county commissioners and seemed to be acting for the bondsmen of Mr. Howard and for Mr. Howard. He presented a petition from the bondsmen to the commissioners. The first petition was presented, I think, before the check was brought in. After the check came that day I think he drew up a resolution and handed it to a member of the county commissioners. (Witness shown and identified copy of pro-
194 ceedings of board of county commissioners of January 13th, 1886.) The second resolution appearing there is the one that was written by Mr. Bailey and offered to the board by a member present—to the board by a member of the board. My impression is that this resolution was presented on the evening of January 12th.

(*Copy of Resolution.*)

"Resolved, That the funds presented to the board of county commissioners by the treasurer, C. K. Howard, in settlement of his account with the county be, and *is* hereby, turned over to his bondsmen, and the bondsmen are put in charge of the office of treasurer until the additional bond is furnished; said funds to be deposited and remain the funds of Minnehaha county."

Testimony of W. H. Corson (page 125, bill of exceptions), 125:

(Witness identifies check in suit.) The first time I saw that check was in county commissioners' room. We were trying to get our matters straightened up on the county treasurer's business. I was on his bond at that time and was seeking to get released. I never had the check in my possession. It was put into the box with other monies and taken down to the Dakota National bank. This was about 11 o'clock on the morning of the 13th of January. I was before the county commissioners on the 13th of January about the time check was delivered to bondsmen. I knew the matter was going to be handled in that way.

Testimony of John Thompson (page 154, bill of exceptions):

I was one of the board of county commissioners in January, 1886, and during the time Mr. Howard was making his semi-annual

settlement. Mr. Howard, the treasurer, at his settlement
195 presented his bank book to the board. The board refused to take that in settlement and told Mr. Howard to go down and either bring up the money or certified check. He went to the bank and he brought up a letter certified, I think, by both the president and cashier of the First National bank. (Witness is shown Exhibit "B" read to the jury.) I think that is the contents of the letter brought back by Mr. Howard. The commissioners would not accept that without either the money or a certified check; that is what the board insisted upon. He went down and brought up a check. (Check in suit was shown witness.) That is the one; I saw it. We accepted that for that amount in settlement with Mr. Howard. He had some money on hand, and that and some drafts and orders and the check made up the amount he was indebted to the county. That check was presented to us on the date it bears, January 12th, 1886. It was about 4 o'clock in the afternoon when Mr. Howard went down for the check. The reason I think it was not after 4 o'clock was that there was some talk that he would have to hurry or it would be after banking hours, and the front doors of the bank were yet open. I know this, for after Mr. Howard left the commissioners we discovered that we had given him the wrong figures as to the amount he would require, and I followed him right down to the bank and went in the front door of the bank myself for the purpose of giving him the correct figures. Mr. Howard was in the bank at the time. A short time after he brought up the check. The whole board and Mr. Wright and D. R. Bailey were there when Howard brought the check in. Different members of the board looked over the check and referred it to Mr. Wright.

We counted the money and the check that afternoon. I think Howard's bondsmen took charge of the check. I am not positive whether they took charge of it that evening or Mr. Howard;
196 it was in Mr. Howard's control until it was turned over to the bondsmen by the commissioners. The reason the commissioners turned the check over to the bondsmen was that the principal bondsman, J. B. Young, had left the county. J. B. Young had justified for $50,000 on the bond and he had left the country, and that made Mr. Howard's bond of no security, and we required him to furnish additional bondsmen, and while he was furnishing these the funds were turned over to his bondsmen. I do not remember whether that action concerning the bond was taken by the board on the 12th or not. I am not positive whether they turned the funds over that evening or not. It is my impression they took possession of the funds that evening. We considered that Mr. Howard had made a fair showing as county treasurer at that time. The reason I have given was our reason for taking possession of the money. The bondsmen had petitioned to be released. Am not positive whether it was made the evening of the 12th or prior. I do not know where the check was taken from the place where it was given to us the evening of the 12th. The board discussed the matter, and we felt insecure on behalf of the county because one of the bondsmen had gone away. I don't think the check was given back

to Mr. Howard. I don't remember who took charge of it that evening. On the 13th it was turned over to the bondsmen. The funds were turned over to the bondsmen by resolution of the board. They were turned over to the bondsmen just during the time that Howard could get additional freehold bonds. We thought Howard's securities insufficient. Mr. Howard stood fair before the board and had made a good showing of his account. We talked with additional counsel besides Mr. Wright, county attorney, before passing the resolution turning the money over to the bondsmen;
197 talked with Mr. Keith. We went to his office. His office was over the Sioux Falls National bank.

Testimony of John McKee (page 160, bill of exceptions):

I was chairman of the board of county commissioners of Minnehaha county in January, 1886. At his settlement Mr. Howard presented to the board a bank book from the First National bank, which we examined. It showed, if I remember right, a credit of some $15,000 or $16,000. We would not accept the settlement on the bank book and told him he would have to get something more definite than that. He went down to the bank and brought up a slip of paper—the Exhibit "B" here which I have heard read. We examined it and passed it over to the district attorney, who said it was only a letter of credit and told Mr. Howard we must have something more definite than that. He went down to the bank again—this was in the afternoon, I judge, before the close of banking hours—and brought up the check in suit. I looked the check over and handed it to the district attorney, who said as soon as Mr. Howard would endorse that check it would be as good as money.

Q. Did you, as county commissioner, Mr. McKee, take advice of Mr. Keith in regard to this matter?

A. Yes, sir; I took advice of Mr. Keith and some other lawyer besides. We also had the advice of our attorney, Mr. Wright. We examined the check when Mr. Howard brought it up on the afternoon of the 12th of January. Mr. Wright told him to endorse it. I won't be positive whether I asked him to endorse it or not. It was either some member of the board or Mr. Wright; I won't be positive. He was asked to endorse it because of the opinion of Mr. Wright that when it was endorsed it would be as good as money. I don't know what was done with it that afternoon; I do not know whether it was endorsed that day or the next
198 morning. We did not do anything as a board concerning the check that afternoon. My remembrance is that we adjourned right away until the next morning. Mr. Howard took the money and the currency that he had in the tin box that evening. I don't know whether he took the check or not. D. R. Bailey was there that evening. The bondsmen presented an application to be released from Mr. Howard's bond either that evening or the next morning; I couldn't remember which. Mr. Howard, H. L. Hollister, D. R. Bailey were there the next morning, the 13th. I believe the bondsmen of Howard were there also. If I remember

right, the money was turned over to the bondsmen that morning. Mr. Hollister took possession of it. Mr. Howard turned it over to their possession by order of the commissioners. The box of money and the check were all there together on the table. Mr. Howard had control and custody of them until they were turned over to the bondsmen. On the evening of the 12th Mr. Howard stood fair with the commissioners, but we deemed his bondsmen insufficient.

Second. The evidence is insufficient to sustain the verdict in that the evidence shows that the plaintiff is not an endorsee of the check in due course:

(*a.*) The plaintiff did not acquire the check in good faith.

The following is all the evidence on that subject:

That Howard was having his semi-annual settlement with the county commissioners on January 12th and 13th, 1886. See the testimony of Howard, John Thompson, John McKee, H. L. Hollister, C. G. Coats, and W. H. Corson, R. J. Wells, and W. F. Furbeck, quoted under subdivision "I" of this motion.

Testimony of H. L. Hollister (page 98, bill of exceptions):

I have been acquainted with C. L. Norton ever since about the year 1879. For a year and a half or two years prior to the
199 organization of the Sioux Falls National he was employed in the First National bank. He went from the First National bank to the firm of McKinney & Scougal or the Sioux Falls National bank, which was the successor of McKinney & Scougal.

Testimony of E. M. Hills (page 96, bill of exceptions):

Am acquainted with C. K. Howard; he was county treasurer in 1886. I know Arthur L. Curry, who at that time, I think, was assistant cashier of the Sioux Falls National bank. On the evening of the 12th of January, 1886, Curry and myself had a conversation at a railroad meeting in the court-house at Sioux Falls concerning a certain check issued by the cashier of the First National bank to Mr. Howard; that Howard had sent his usual bank book to the commissioners and they were not satisfied with it, and afterwards and finally they had sent up the check, and that it was issued with the expectation that it would come back as in former settlements; that money had been sent up in a pillow to the county treasurer's office, and they had given a check and it had not come back and it was afloat and somebody else would probably get it away from the First National bank. I do not remember that the amount of the check was stated. It was stated that the commissioners were having a settlement with Howard.

Testimony of John Thompson (page 154, bill of exceptions):

We talked with some additional counsel besides Mr. Wright, the county attorney, before passing the resolution turning the money over to the bondsmen. It was Mr. Keith; we went to his office; his office was over the Sioux Falls National bank.

By Mr. KEITH:

Q. Mr. Thompson, counsel have asked you about coming to my office for counsel. Do you mean to be understood that you came
200 to my office for counsel in regard to this check or anything connected with it?

A. No, sir.

Testimony of John McKee (page 160, bill of exceptions):

Q. Did you as county commissioner, Mr. McKee, take advice of Mr. Keith in regard to this matter?

A. Yes, sir; I took advice of Mr Keith and some other lawyer besides.

We had the advice of Mr. Wright, the district attorney, too; it agreed with the advice of Mr. Keith on some points.

Q. Did it agree in regard to the matter of the disposition of this check?

A. I do not think I asked Mr. Keith's advice in regard to this check.

Testimony of C. Frank Irvine (page 129, bill of exceptions):

Was with the First National Bank of Sioux Falls from May 1st, 1883, to July 1st, 1884; have been with the Dakota National bank now about 17 months. In January, 1886, I was with the Dakota National bank. I saw the check in suit about January 12th, 1886, in the Dakota National bank; Mr. Brace, the president, came out of the back room of the bank and he, Mr. Carpenter, the cashier, and I looked up the check together. I took the check and went across the street to the First National and presented it at the counter for payment. I presented the check to Mr. Furbeck and he took it and showed it to Mr. Wells and he and Mr. Wells came to the window together and Wells said, "I do not propose to pay that." I took the check then and went back to the Dakota National bank; this was in the forenoon, I should say about 11 o'clock; H. L. Hollister, C. G. Coats, and D. R. Bailey were in the back room of the Dakota Na-
201 tional bank at that time; I think Mr. Brace handed me the check; I was clerk in the Dakota National bank.

Testimony of George H. Brace (page 132, bill of exceptions):

Have been president of the Dakota National bank a little over two years; was president of that bank in January, 1886; am acquainted with C. E. McKinney; at that time he was president of the Sioux Falls National bank. McKinney and I at that time boarded at the Cataract house and were in the habit of sitting at the same table. On January 13th, 1886, about 12 o'clock noon, while we were at dinner, we had some little conversation. I think Mr. McKinney asked the question in what little conversation there was—there was not much said upon the subject—if I knew who was to get the deposit; I replied that I did not; we referred to the county treasurer's deposit. C. C. Carpenter was present at the time.

Testimony of C. C. Carpenter (page 130, bill of exceptions):

Mr. Brace and I took dinner at the Cataract house together January 13th, 1886. McKinney was sitting at the same table with us. I had but very little conversation with Mr. McKinney. McKinney asked me if I had been up to the county commissioners' room or if I had heard what they had done about settling with the county.

Testimony of Jacob Schaetzel (page 108, bill of exceptions):

In January, 1886, I was a stockholder and director in the First National bank; have known C. E. McKinney, president of the Sioux Falls National bank, six or seven years. On the 13th of January, 1886, at about half past twelve or one o'clock in the afternoon, I came in the office of the Cataract house, on the corner of Phillips avenue and Ninth street. The bank is right in the southeast
202 corner of the building. The hotel office is L-shaped and surrounds two sides of the bank; there is a door from the west end of the hotel office into the bank. As I came into the office I saw Mr. McKinney and Henry Corson, I think, and one other man was standing there and I heard them talking about a check, and Mr. McKinney asked, What is it? "Is this a straight cashier's check?" and Mr. Corson, Henry, I think, said, "Yes." He says, I would like to have it; they would either pay it or close their doors.

Testimony of C. C. Carpenter, p. 130:

Have lived in Sioux Falls two years and half and been engaged as cashier of the Dakota National bank. The Dakota National bank was on the east side of Phillips avenue in January, 1886; the First National bank was opposite on the corner, and the Sioux Falls National was down the avenue in the same block with the Dakota National. There is a vacant space between the Dakota National bank and the river about twenty or thirty feet wide; it extends down nearly to the lower end of the block. I know H. L. Hollister, C. G. Coats, D. R. Bailey, and W. H. Corson; they were all together in our bank about the 13th of January, 1886. After dinner I had a conversation with Hollister about getting the credit at another bank. The tin box was left in our safe during the noon hour; I think Mr. Coats took it from the bank. Bailey, Hollister, Corson, Coats, Brace, and myself were present at the time it was taken away.

Q. What was done with the box and the check?

A. Some of them went out our back door; which ones I could not say; the parties that went out took the box.

Testimony of H. L. Hollister (page 98, bill of exceptions):

At that settlement the county funds were turned over to the bondsmen by the county commissioners; the funds consisted
203 of checks, drafts, and money, gold and silver. There was probably $17,000 or $18,000 in checks of the $27,000. This check in suit was a part of the funds that I have testified to and that we receipted for. We received it January 13th. When this

money was turned over to us the funds were in a little trunk or box on the table. I took the trunk down to the Dakota National bank. The box containing the check and funds was left in the safe of the Dakota National bank when I went to dinner. We had offered to deposit them there. After dinner we took the box to the Sioux Falls National bank. Coats, Corson, and myself went out the back door of the Dakota National bank and into the back door of the Sioux Falls National bank. We there met C. E. McKinney, president; C. L. Norton, cashier; A. L. Curry, assistant cashier of the Sioux Falls National bank, and D. R. Bailey. We went there between one and two o'clock. I had seen Bailey both before and after dinner. We were in the Sioux Falls National bank probably 10 or 15 minutes; long enough to count the money. Norton, I think, was in the front office at the time we were counting money—may have been back and forth once or twice. Curry and McKinney helped me count the money; they gave me a pass book for the bondsmen and I put it in my pocket and went home. The pass book as read to the jury is as follows:

(On the cover:)

Sioux Falls National Bank, Sioux Falls, Dakota, in account with H. L. Hollister, C. G. Coats, W. H. Corson, bondsmen.

(On first page:)

Sioux Falls National Bank, Sioux Falls, Dakota, in acc't with ——— ———, Dr.

| | | |
|---|---|---|
| Jan'y 13 | | $27,236 63 |
| " | | 430 00 |

204 I did not endorse this check and was not asked to. We were not in the back room, but in the back office. There are three rooms. Coming in at the back door there is a kind of a store-room. The next door enters into the back private office. The next room is the bank-room proper, where the counter is. Nothing was said about endorsement there. I don't think anything was said about our having come from the Dakota National bank. I had charge of the counting of the money and was busy with it. There were some six or seven checks included in the deposit. I endorsed the other checks. It was not a mistake—the omission to endorse this check; we were not asked to endorse it.

Q. Well, why did you endorse the others and not endorse this?

A. Well, I think that some of the others were some drafts on outside banks and some post-office orders——

Mr. McMARTIN: That hardly answers my question, Mr. Hollister.

Q. Why did you endorse the others and not endorse this check? Was it not a fact that it was an understanding they should take it without endorsement?

A. Mr. Bailey said—Mr. Bailey was acting for us—his employment could not extend to this. He told me before we went down

that he had been to see Mr. McKinney in regard to this deposit. I do not remember that anything was said by any one present in the Sioux Falls National bank as to Bailey's having been there before that concerning this deposit. Bailey did not go with us to the Sioux Falls bank. We left him at the Dakota National bank. He was in the Sioux Falls bank when we went in or came in soon after; just about the time we did. He must have gone the front way.

I should think out of the whole number there was over $2,000 in checks, post-office orders, and all that I endorsed. I think
205 there were five or six of them. When we went into the back door of the Sioux Falls National bank I presume I said something: "I have brought you a deposit," or "Here it is;" "I have brought you a deposit," or "the deposit," or something of that kind. I referred, of course, to the county deposit. It was understood that it was not my deposit. I told Mr. McKinney that it was the county funds. I was very particular about that, because I did not want it put in any other shape only as the county. During my acquaintance with Howard, and especially during the time that I acted as his bondsman as county treasurer, I presume I knew as much about his business as he knew himself.

Q. Was there any money drawn out by you or any of the bondsmen that day, the 13th, or the next or any change made in this account?

A. The only change made in the account was this small credit (the second item); that was currency put in for a deposit that was made.

Q. How many times in your experience as banker in Sioux Falls have individual checks been presented to you of the amount of $16,000?

A. I remember three or four in a period of seven or eight years.

Q. Did you receive any communication from anybody regarding the making of this deposit at the Sioux Falls National bank? And, if so, state who and the circumstances surrounding it.

A. The communication was with Mr. Bailey——

Q. At what time?

A. When I returned from dinner; I presume between one and two o'clock.

Q. Where?

206 A. Near the Dakota National bank. I think perhaps in front of it, between the Cataract house and the Dakota National bank. The Dakota National bank is in the building next to the corner of Ninth street on the east side of Phillips avenue, and the Sioux Falls National bank is in the building next to the corner of Eighth street on Phillips avenue, in the same block. Eighth street is north of Ninth street. At the time we were at the Sioux Falls National bank McKinney was engaged with me in counting the deposit. Mr. Curry was present also, assisting in the count. We, the bondsmen, all went out as soon as the deposit and the proper entry was made.

Q. Did you ever have an account before in connection with Coats and Corson?

A. Did they have any account in the bank?

Q. Yes, sir.

A. No, sir. Neither Mr. McKinney or any of the officers of the bank ever asked me to take the check back; neither myself nor any of the bondsmen have been called upon to make the check good to my knowledge.

Testimony of Clark G. Coats (page 110, bill of exceptions):

The check in suit was turned over to Howard's bondsmen, I think, on the 14th of January. I am not certain of the date. I never had any interest in the check. Bondsmen took it to the Dakota National bank the same day, together with some money, in a small tin box. We afterwards carried it to the Sioux Falls National bank, I judge, about 2 o'clock in the afternoon. Mr. Hollister and Mr. Corson, my cobondsmen, were with me when we took it to the Dakota National bank. We went out of the back door of the Dakota National bank and into the back
207 door of the Sioux Falls National bank, down the river bank. I think there were two or three in the office of the Sioux Falls National bank when we were in there. I think Mr. McKinney, Mr. Norton, the cashier, and Mr. Curry, assistant cashier, of the Sioux Falls National bank, were in the office while we were there. While there Hollister, Curry, and McKinney counted the money. We stayed there long enough to do the business, count the money and make a deposit. Bailey was in the room that day. I do not know as anything in particular was talked about—the check at that time; nothing more than it called for $16,000, and we were to have a deposit for what the check called for. I think Mr. Bailey, after the money had been counted, said to Mr. McKinney, "That is a pretty good sized check, and you had better go and get your money on it." Mr. McKinney said he would collect it or he would see that the doors did not open the next morning. I did not endorse the check. The next day I was at Keith's and Young's office, over the Sioux Falls bank. I think Hollister or Bailey asked me to go there. I think Bailey was acting for the bondsmen, but am not certain. There was a check given against this fund, which I signed, I think, on the morning of the 14th of January, but am not certain as to date. It was during this settlement with the county treasurer that the money was turned over to the new treasurer. I never signed but one check, to my knowledge.

Testimony of W. H. Corson (page 125, bill of exceptions):

The first time I saw the check in suit was in the county commissioners' room. We were trying to get out matter straightened up on this county treasurer business. I was on his bond at that time, and we were seeking to get released. I never had the check
208 in my possession. It was put into the box with other money and taken down to the Dakota National bank. This was about 11 o'clock in the morning of the 13th of January.

Q. Did Mr. Irvine take the check to the First National bank and present it for payment at your instance?

A. I think he did.

After dinner, about two o'clock, the box, money, and check was taken to the Sioux Falls National bank. I was in the Dakota National bank that morning, probably, for an hour. The box and money was left there while we were at dinner. We did not agree to endorse the check. After or before dinner, a very short time after we came out of the Dakota National bank, Mr. Bailey met Hollister some place, and Hollister came and said to me, "The Sioux Falls National bank will take the check and give us credit for that amount of money." I told him it was my idea that that was the best thing we could do. We took the box and money and check down to the Sioux Falls National bank after dinner. We went out the back door of the bank and took the "river route" and went into the back door of the Sioux Falls National. We were in the directors' room, I suppose, which was the first room back of the bank proper. I don't think I could tell what was done there except counting the money. We went out as quick as we could. McKinney said if the check was not paid the bank would not open their doors to-morrow morning. I knew there was a question in regard to this check, of course. There was no caution given to me on the part of any of the bank. There was some little caution that I was to take care of myself. I wanted to get out as quick as possible.

Q. Don't *tou* remember of his using an expression like this, cautioning you not to say anything about the check having been presented?

A. I think there was such a conversation, but as to when
209 it occurred I could not tell; whether at that time or some other. I know they sent for us to come down the next morning. It might have been done at that time or some other. Mr. McKinney sent for myself, Hollister, and Coats.

Q. Is it not a fact that he cautioned you about saying anything about the check to any one?

A. I do not recollect that McKinney cautioned us about saying nothing about the check to any one. I heard such a remark, but do not know who it came from.

I know it was talked among ourselves that we had better know as little about it as possible. I think that conversation was between some of these parties I have mentioned, but am not sure whether it was in the bank or not. We went down to the bank the next morning after we made the deposit. In the meantime the Sioux Falls National bank had presented the check; it was not on that occasion that he, McKinney, said that if they did not pay it their doors would not open to-morrow morning. I am quite sure about that, because Mr. Coats and I were talking about it afterwards and he asked me if I remembered that conversation. I was before the county commissioners on the 13th of January, about the time this check was delivered to the bondsmen. I knew that this matter was going to be handled in that way.

Testimony of W. F. Furbeck (page —, bill ofexceptions):

I have been engaged in the banking business about 25 years; in

Chicago most of the time; at Sioux Falls for a year or so. The invariable custom prevalent among bankers is for depositors to endorse all paper that he puts into a bank to his account in any bank that I have ever been connected with or ever heard of; was familiar with the banking business in Sioux Falls in January, 1886.

210 Testimony of Eben M. Hills (page 96, bill of exceptions):

Have lived at Sioux Falls about six years; was cashier of the Citizens' bank from May, 1881, to November 15th, 1886, and since that time have been cashier of the Citizens' National Bank of Sioux Falls.

Q. What is the custom of bankers at Sioux Falls as to the disposition that is made by them of checks drawn upon other banks and deposited by a depositor of the bank in case afterwards the check presented at the bank upon which it is drawn is dishonored—payment refused?

A. When a check or anything that is not cash, currency, or gold is deposited, it is the custom to have depositors endorse it unless it is a check on our own bank; if when the paper is presented by the bank to the bank upon which it is drawn payment is refused, it is customary, if it is the same day's business and the amount has not passed upon the book of the depositor to his credit, to either charge it back to the depositor or change the deposit; if it is not in the same day's business and the item has gone to the depositor's credit, we charge it back to him.

Q. What is done with the check then?

A. If the depositor drew a check to make it good we would give him this check; if he did not, we put the amount into his book and return it to him at the end of the month. It is customary to require an endorsement when a check is deposited.

Testimony of R. J. Wells (page 117, bill of exceptions):

The next morning, the 13th, about 10 o'clock, C. F. Irvine, who was then employed in the Dakota National Bank, presented this check to the cashier, Furbeck; Furbeck called me to the cashier's window and Irvine then presented the check for payment. I refused payment and told him we would not pay it. In the
211 afternoon of the same day, 13th, C. E. McKinney presented the same check at the First National Bank for payment, and payment was refused. The same afternoon C. L. Morton presented the same check for payment and payment was again refused. In the evening of that same day C. L. Norton, cashier of the bank, called at my house, and, not finding me at home, come up to Mr. Wilkes' and stated to us that there would be trouble on the morrow if we did not pay that check. After considerable conversation we three went down to the Sioux Falls National bank and there met C. E. McKinney and H. H. Keith, one of plaintiff's attorneys. We said to Norton and McKinney, in the presence of Keith, that this check had been obtained from the First National bank without any consideration and had been fraudulently diverted from the

purpose for which it was issued, and that now they had better charge this check back to the party from whom they got it. They admitted that they had paid nothing for it and said that was not the way of doing things, and they proposed to make us pay it. After repeated urging for them to take it back and strongly insisting that they should do so, Mr. Norton replied they would not do that; they couldn't do it, and that if we didn't pay it they knew a way to make us pay it, and that mighty quick, too. Mr. McKinney also said that they would not charge it back, and appealed to Mr. Keith, who, I think, asserted, as a legal proposition, that they could not charge it back. Mr. Wilkes also stated the same thing to them and got substantially the same reply. Mr. Peck came down, I think, while we were there, and the conversation was carried on in that strain, and went and got Mr. Furbeck and the conversation was then continued, we urging them to pursue the usual friendly course between banks and not inaugurate a run. They
212 insisted that they would not do it. When Mr. Norton came up to the house he stated there was going to be a run if it was not paid, and I found, when I came down-town, it had been started already. At the time McKinney first presented the check in the afternoon of that day I said this to him, among other things: That I did not recognize that he had any right to that. He said, as being county paper, he said he wanted the county deposit—something to that effect. My recollection is that I stated that the check did not represent anything to us—did not represent any consideration—and we would not pay it.

Testimony of Porter P. Peck (page 122, bill of exceptions):

The evening of the day the check was presented to the First National I was in the Sioux Falls National bank. Mr. Wilkes was with me. Mr. Wilkes requested Mr. McKinney and Mr. Morton, as president and cashier of the Sioux Falls National, not to press the First National for the payment of that check, but to charge it back to the parties, as it was dishonored for the reason of the bank not having received any value for it. He insisted upon their not pressing the payment of the check, but to charge it back. That was the burden of the conversation. Mr. McKinney said that he should insist on the First National paying the check.

Testimony of W. A. Wilkes (page 136, bill of exceptions):

I was present in the commissioners' room during that settlement the first time on the evening of the 12th of January, the evening the check in suit was given. N. E. Phillips and E. G. Wright and some of the commissioners were there. It was very late in the day—almost dark. The board was not in session. At that time I think I first called Mr. Wright to me or walked towards him—he was off at one side
213 of the room—and inquired of him concerning the proceedings of the board and said to him I understood there was a check before the board involving the matter of Mr. Howard's settlement, and I wanted to notify them not to take into consideration that check as involving so much money; that the bank would defend against it as in

the hands of Howard and refuse payment. Substantially that was what I said to him and substantially the same thing to Mr. Phillips, the clerk, although not quite so fully, I think, to him as I had to Mr. Wright. I went there at the request of Mr. Wells, president of the First National bank. I was in there the next day when the board was in session, and talked with the board there concerning this matter. I think it was in the afternoon of the 13th I notified the board not to make any settlement with Mr. Howard involving this check in suit as representing the cash that it called for, and that is what I was there for. I had a conversation at their bank with Mr. McKinney and Mr. Norton concerning the check in the evening on the 13th of January. There were present Mr. Norton, Mr. Keith, Mr. McKinney, Mr. Wells, Mr. Furbeck, and myself part of the time, and later in the evening Mr. Peck and Mr. McKinney, with myself, were present. I went there in company with Mr. Norton and Mr. Wells; while there I said to Mr. McKinney substantially what we wanted them to do—that we wished them to charge this check back to the depositors from whom they got it and not to get into any lawsuit, which would be injurious to both of the banks and the community. I used the expression over and over again, You have not paid out anything on it; you have not suffered anything on it; charge it back. They declined to do so, and Mr. McKinney replied at one time during the conversation substantially like this: The First National bank has been doing that thing off and on time and time again for years, and we don't propose to charge it back. And he refused to do so. Later in the evening, after going to the First National bank, Mr. Peck and I went down there alone, and I renewed the conversation with Mr. McKinney on the same subject and endeavored to have them charge the check back, which they refused to do and brought suit the next day.

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Testimony of Samuel T. Clover (page 115, bill of exceptions):

I reside in Sioux Falls, and in January, 1886, was publishing the Sioux Falls Leader. I am acquainted with Arthur L. Curry. In January, 1886, he was assistant cashier of the Sioux Falls National bank. On Friday morning, the 15th of January, 1886, I had a conversation with him concerning the issuance of a check of $16,000 by the First National Bank of Sioux Falls to C. K. Howard. He came to my office in the forenoon of the 15th and opened the conversation by asking me if I had written an article relative to the issuance of the bank check, or rather on the subject in relation to the bank check. I said that I had not; that I was investigating and trying to get the meat of the matter and wanted to give the facts as they stood. He then said that the Sioux Falls bank had done a great deal for me and now was the time for me to stand by them; that it was a matter of vital importance to them, and emphasized that several times. I said I realized that, of course, but I could not give more than the facts of the case and did not propose to. He said that the bank had got the check, and invited me down to look at it. I did so later on. I asked him how they came by the

check—how they got it. He told me that the bondsmen, in company with Mr. Bailey, came to the office of the bank on the day previous and Mr. Bailey acted for the bondsmen and they had got the check, and he assured them it was all right. I questioned him closely about it and he told me that Mr. Bailey assured them that they were all right and the First National bank would have to pay the check or they would bust the bank. I was a depositor in the Sioux Falls National bank at that time and was always required by them to endorse paper; that was always a custom at that bank with me.

Testimony of C. E. McKinney (page 165, bill of exceptions):

I am president of the Sioux Falls National bank. In January, 1886, the bank was located on Phillips avenue, facing west; the front door opened into the banking-room, the counter being on the left going in. The counter went down to a partial partition which opened by archways, one on the inside and one on the outside of the counter, into the directors' room, back of which was a storeroom, and the back door of the bank was about 30 feet from Eighth street. Depositors of the bank frequently came in at the rear door to make their deposits. At the time the deposit of the county funds was made by the bondsmen Mr. Hollister, Mr. Coats, and Mr. Corson came to the bank, and Mr. Curry and Mr. Norton, Mr. Bailey, and myself were present. When they came in I was busy in the front part — our banking-room. I do not know as a matter of personal knowledge which way they came into the bank; when I first saw them they were in the directors' room. As I came into the room and saw them there Mr. Hollister was standing at the desk. He said, "I have brought you a deposit. I make it about so much. You count it over and see if I am correct." As he said that he turned out the money. It was composed of bills, silver, gold, and checks. I began counting the money. At that Mr. Curry came in, and I said to him, "Please help me count this deposit." We counted the deposit, and as Mr. Norton came in I called him, and I said, "Make out a book for this deposit;" and he went in and got a book and asked in whose name to make it out, and either Mr. Bailey or Mr. Hollister said, "Make it in the name of Hollister and the other bondsmen as bondsmen." After I counted the money Mr. Curry took the money and put it in the front room on the counter, where the telling was done, and the credit was given. I think Mr. Norton brought back the book and handed it to Curry, and Curry made the credit and handed it to Hollister, and the bondsmen left. (Check in suit shown witness.) This check was part of that deposit. I ran the checks over, and when I came to this I said, "This is a good, nice check—a good-sized check." Mr. Hollister said, "Yes." I said, "That is a good check." He said, "We regard it as cash;" and I said, "Certainly." He said, "I want this deposit as cash." I said, "As far as I see, I don't see any reason why we consider it as cash; we regard this as cash." We had received cashiers' checks on this same bank before and treated them as cash. They had always been paid on presentation. I had

no knowledge or information of any of these parties that there was anything claimed to be wrong about that check at the time we received it. There was nothing said by any of them in reference to it. I had no knowledge or information from any source that there was anything wrong claimed about this check. I heard the testimony of Mr. Schaetzel in regard to the conversation he claimed to overhear. I did not have any such conversation in the Cataract on the 12th or 13th day of January, 1886. I had a conversation with Mr. Corson, in the Cataract house, in relation to the matter on the next day, the 14th. I asked him to go on the attachment bond, which he did. I do not think I had a conversation with Mr. Corson about the check on the 13th. It was one of our busy days. At that time I
217 don't think I knew anything about this check. I heard Mr. Hollister's testimony. I don't think I asked Mr. Hollister to endorse any checks or drafts; those that were made payable to C. K. Howard, county treasurer, and not endorsed at all. He said ther were in charge of the funds of the county treasurer, and "I ought to have a right to endorse for Mr. Howard," and I think he did endorse in the name of C. K. Howard; that was the extent of it. If he did anything more than that he was not asked to. I first saw this check when it came there to be deposited. I think Mr. Hollister carried the box and turned it over on the desk. It was a long desk. He stated they were in charge of the funds of the county treasurer while he was getting his bonds. I suppose he claimed to deposit these funds in the character of bondsmen; that is the way the deposit was made out. I simply inferred from that——

Q. Simply as bondsmen in custody of the funds of the county treasurer—that is the way you understood it?

A. I think that is the way, as I remember it now; there were other checks with this one on various banks in the city, probably some 10 or 12. It was customary for quite a number of our depositors to come in at the back door; the back door opened out onto a platform leading to the public highway—Eighth street; running north and south by the rear door of the building there was a vacant space of ground which allowed teams to come in with goods to the stores. Our bank was in the building on the corner of Phillips avenue and Eighth street; the building was 44 feet wide and we had the inside 22 feet. This vacant space was on the river bank and a number of outhouses were on it. The back room of our bank was not occupied as an office; it was a sort of a vacant room where we sometimes put boxes. I do not remember whether the platform
218 extended farther south than our building or not. The Dakota National bank was located south in the same block as ours north. I did not see these parties when they came into the bank; I was in the front part of the front room. Our directors' room and the tellers' room are all one, simply separated by this slight partition that has been referred to. It was in the directors' room where I met these parties. I think D. R. Bailey called me into that room. He was in the front part of the front office when he spoke to me; he said step into the back room. When I went in

there Mr. Hollister first spoke to me concerning this deposit; as I stated before, he said, "I have a deposit here for you." He said, "I make it about so much; you count it over and see if I am correct," and dumped the money out on the desk and I began counting. I assisted in counting the deposit. I don't think any one showed me this check for $16,000. I think I picked it up lying with the other checks on the desk. I was talking with Mr. Hollister; he stood at my right. I think I said, "This is a nice check—a good-sized check." So far as I know there were two or three of the checks that were not endorsed; they were not endorsed by the bondsmen, I think. I did not ask them to endorse those checks, except perhaps two or three that were not endorsed by Mr. Howard.

Q. Was it your custom to require endorsement of checks deposited to the account of a depositor?

A. It depends upon the shape they were in. If a man brought a check in drawn to the order of the party, we would require the endorsement of the party to whose order it was drawn; but if we knew all the parties to the check and either party brought the check
219 in, we did not require the endorsement; and where the checks were made payable to bearer we did not; as a general rule, we did not require endorsement of checks of that kind. I did not think it was necessary to have this check endorsed. I knew all the signatures to it and we regarded the check as good as cash. There was no talk between myself and any of these bondsmen concerning the endorsement of the check at the time it was taken on deposit. I did not ask the bondsmen for any arrangement of indemnity in case we did not get the money on the check at that time, and I don't think we ever did. I have no recollection of asking any of these depositors after payment was refused to indemnify the bank or take the check back. We did not charge the check back to them on the books of account of the bank. Up to the time of the commencement of this suit we had paid out no money on that account. I did not ask any of the depositors if payment had been refused before I took the check. I did not inquire of them whether it had been presented for payment. I do not think that any of the persons who made this deposit had any standing account with us, and we had no account with them as bondsmen prior to this deposit. An entirely new account was opened with them at the time of this deposit. I did not know that the check had been presented for payment on behalf of the bondsmen before they brought it to our bank for deposit. I learned before the commencement of this suit, I think the evening, probably, of the 13th, when Wilkes was down to the office, that the check had been presented. I also learned it had never been absolutely refused. I knew when Mr. Norton presented it as cashier and demanded payment, but did not know that payment had been refused to the bondsmen. I am not aware that any officer of our bank went to see these bondsmen or any of them concerning the
220 return of this check after payment was refused. I gave no instructions. I think the money that was paid out on this deposit by us was all paid out at one time on one check. I think nothing was paid out on this account prior to January 19th. I

knew before January 19th what Mr. Wells and Furbeck claimed to be the circumstances concerning the issuance of this check by Mr. Furbeck. I think Mr. Hollister was the first one that spoke to me about taking this deposit made by the bondsmen. That was between two and three o'clock in the afternoon of January 13th, the time when they brought it there for deposit. Prior to that I had some conversation with D. R. Bailey; this was right after dinner. I was sitting in the directors' room, where I could see the teller's desk. Mr. Bailey dropped in and I asked him where he had been the last two days. He said he had been busy, engaged, I think, in behalf of the bondsmen of C. K. Howard getting out on the bond; that J. B. Young had left and they wished to be released, and that office had been turned over to the bondsmen with the money. I then inquired if they proposed to keep the deposit in the First National bank; he said they thought not. I asked him if he knew where they proposed to deposit and he said he did not. I said we would like the deposit; we want to get it, and I see no reason why Mr. Hollister hadn't just as soon deposit with us as deposit with any of the other banks. I might have asked him how much the deposit was or the amount of the funds that was turned over. If I did I think he told me. Mr. Bailey did not show me a list of what the deposit consisted of; he may have pulled out a piece of paper. I am not certain whether he made a statement concerning the deposit or not. He may have mentioned the fact of there being a cashier's check among the deposits.
221 I don't remember whether he did or not. Mr. Bailey may have been there more than once that day before they brought in the desposit. Nelson Bailey, a son of D. R. Bailey, was employed in our bank two or three weeks after that. I did not go to see the commissioners about it after learning that this was county money. I did not have any consultation with them in regard to the check. I don't think I have ever seen their resolution transferring the money to the bondsmen, and I don't know as I ever heard it read until to-day. I have heard of it. Up to that time I had received many drafts of larger amount than this one on deposit; they were not a common occurrence, but a frequent occurrence. I do not remember that we ever took a check of that size without the endorsement of the depositor. We had no official meeting concerning the taking of this check on deposit; the majority of our directors were seen. I don't know as we ever before took a deposit of $27,000 in a tin box through the back door of the bank. My impression is that C. L. Norton was the cashier of our bank on the 19th of January, 1886. I did not know anything of the way that this check had been issued at the time I took it; I supposed it was issued in the usual way. I don't remember whether I sent for Mr. Hollister the next day after presenting this check to the First National bank. I knew he was down in Keith's office the next day. I did not hear any conversation in which the expression was used, "keep clean sheets so that you can go into court and testify." The check I might have supposed came from the county treasurer; it was endorsed in his handwriting, and I probably knew it from that

fact if from no other. There was a rivalry between our bank and the First National bank to get business the same as between all banks. I don't remember any instance in which Mr. Hollister and I had any difficulty.

222 Testimony of Arthur L. Curry (page 176, bill of exceptions):

In January, 1886, I was assistant cashier of the Sioux Falls National bank. When this deposit was brought to the bank I was not in, but came in while they were there and helped Mr. McKinney count the funds. After they were counted we carried them in the front room. I was acting teller at that time, and proceeded to put it on the books. (Book shown witness.) This is the cash book used at that time. It shows the entry of this deposit made in my handwriting at that time. At the left we put down the name of Hollister and the bondsmen, and charged cash $27,236.63, and credited the account to the depositors. This book is the individual ledger used at the time this money was checked out. It is a book of original entry.

Q. What time was this money as testified to checked out by the bondsmen?

A. January 19th, 1886.

(Bondsmen pass book shown witness.) That is the pass book made on the occasion of that deposit. The entry is in my handwriting. I made it at that time for the purpose of giving them credit. I was present during all the time this money was counted, and participated in the counting. Mr. McKinney was assisting me, and Mr. Hollister was also checking over part of it. Nothing was said by any of the bondsmen or anybody else there present about this check having been presented anywhere or that there was anything irregular about it in any way, shape, or manner. This was the first time I ever saw or heard of the check. When we received the check we gave them credit for it as cash. I heard the testimony of Mr. Hills in regard to a conversation that he claimed to have with me at some rail-

road meeting. As I had no knowledge at that time of the
223 existence of the check, I had no conversation in relation to it. I had frequent conversations with Mr. Hills, and I apprehend he is mistaken as to the time. I might have had that conversation, but I had no conversation with him at that time on that subject. I did not know at that time that the bondsmen were trying to be released, nor that the check had been issued. Mr. Hills must be mistaken as to the time. I am unable to state whether I was at the railroad meeting. I do not know whether I met Mr. Hills on that occasion. I do not remember whether there was a railroad meeting. I could not have spoken of what I did not know. I knew nothing of the check; this check that was deposited with us was credited as cash. It was not stated and particularly mentioned that this was to be taken as a cash item; there was nothing said to me about it. I was acting as clerk—as teller—and the custom was to credit these items as cash. Nothing was mentioned in my hearing as to taking this as cash. This deposit was taken in

the usual ordinary course, just the same as other deposits. If checks were brought in by the parties to whom they were drawn, we required an endorsement; if not brought in by the payee or drawer, it depends largely upon the check whether we would require the endorsement of the party bringing it. We were perfectly familiar with every signature on this check. It is not our invariable rule to require endorsement; this was a case where we did not require endorsement; we were satisfied to take it from any party simply on the endorsement on the back of it. We considered that by his endorsement Mr. Howard had assigned his interest in the check to the holder of it. We were to become the holder of it. That was
what I was interested in; interested in getting hold of the
224 check as a deposit. We customarily followed the law concerning the protesting of endorsed paper. We had handled such checks before.

Q. Were they taken without endorsement?

A. I could not say how they were taken. I assume they were in proper form and properly endorsed. We always treated them as cash.

(*b.*) The plaintiff did not acquire the check in the ordinary course of business. The following is all the evidence on that subject:

Testimony of H. L. Hollister, p. 98:

When this money was turned over to us the funds were in a little trunk or box on the table. I took the trunk down to the Dakota National bank. The box containing the check and funds was left in the safe of the Dakota National bank when I went to dinner. We had offered to deposit them there. After dinner we took the box to the Sioux Falls National bank. Coats, Corson, and myself went out of the back door of the Dakota National bank and into the back door of the Sioux Falls National bank. We there met C. E. McKinney, president; C. L. Norton, cashier; A. L. Curry, assistant cashier of the Sioux Falls National bank, and D. R. Bailey. They gave me a pass book of the bondsmen and I put it in my pocket and went home. The pass book as read to the jury is as follows:

(On the cover:)

Sioux Falls National Bank, Sioux Falls, Dakota, in account with H. L. Hollister, C. G. Coats, W. H. Corson, bondsmen.

(On first page:)

225 Sioux Falls National Bank, Sioux Falls, Dakota, in account with —— ——, Dr.

| | |
|---|---|
| Jan'y 13 | $27,236 63 |
| 13 | 430 00 |

I did not endorse this check and was not asked to. We were not in the bank-room, but in the back office. There were three rooms.

Coming in at the back door there is a kind of a store-room; the next door enters into the back private office; the next room is the bank-room proper where the counter is. Nothing was said about endorsement there. I had charge of the counting of the money and was busy with it. There were some six or seven checks included in the deposit. I endorsed the other checks. It was not a mistake, the omission to endorse this check. We were not asked to endorse it. Mr. Bailey was acting for us; his employment could not extend to this. He told me before we went down that he had been to see Mr. McKinney in regard to this deposit. I do not remember that anything was said by any one present in the Sioux Falls National bank as to Mr. Bailey's having been there before concerning this deposit. Bailey did not go with us to the Sioux Falls National bank; we left him in the Dakota National bank. He was in the Sioux Falls National bank when we went in, or came in soon after, just about the time we did. He must have gone the front way. I should think out of the whole number there was over two thousand dollars in checks, post-office orders, and all that I endorsed; I think there — five or six of them. When we went into the back door of the Sioux Falls National bank I presume I said something, "I have brought you a deposit" or "Here it is"—"I have brought you a deposit" or "the deposit"—or something of that kind. I re-
226 ferred, of course, to the county deposit; it was understood that it was not my deposit. I told Mr. McKinney that it was the county funds. I was very particular about that, because I did not want it put in any other shape only as the county.

Q. How many times in your experience as a banker in Sioux Falls have individual checks been presented to you of the amount of $16,000?

A. I remember three or four in a period of seven or eight years.

Q. Did you ever have an account before in connection with Coats and Corson?

A. Did they ever have an account at the bank?

Q. Yes, sir.

A. No, sir.

Testimony of C. G. Coats, p. 110:

The check in suit was turned over to Howard's bondsmen, I think, the 14th of January; am not certain of the date; I never had any interest in the check. The bondsmen took it to the Dakota National bank the same day with some money in a small tin box. We afterwards carried it to the Sioux Falls National bank, I judge about two o'clock in the afternoon. Mr. Hollister and Mr. Corson were with me when we took it to the Dakota National bank. We went out of the back door of the Dakota National bank and into the back door of the Sioux Falls National bank down the river bank. I think there were two or three in the office of the Sioux Falls National bank when we were in there. I think Mr. Charles McKinney, Mr. Norton, the cashier, and Mr. Curry, assistant cashier, of the Sioux Falls National bank were in the office while we were there. I did not endorse the check.

227 Testimony of W. H. Corson, 125:

I never had the check in my possession. It was put into the box with other moneys and taken down to the Dakota National bank. This was about eleven o'clock in the morning of the 13th of January. After dinner, about two o'clock, the box, money, and check were taken to the Sioux Falls National bank. I was in the Dakota National bank that morning probably an hour. The box and money were left there while we were at dinner. We did not agree to endorse the check. After or before dinner, a very short time after, we came out of the Dakota National bank. Mr. Bailey met Hollister somewhere and Hollister came and said to me, "The Sioux Falls National will take the check and give us credit for that amount of money." I told him it was my idea that that was the best thing we could do. We took the box and money and check down to the Sioux Falls National bank after dinner; we went out of the back door of the bank and took the "river route" and went into the back door of the Sioux Falls National. We were in the directors' room, I suppose, which was the first room back of the bank-room proper. I don't think I could tell what was done there except counting the money. We went out as quick as we could.

The paragraphs from the records of the board of county commissioners under subhead (c) of this division (I) of this motion:

Testimony of John McKee (page 160, bill of exceptions):

I am acquainted with W. A. Wilkes. He did not appear before the board on the 12th of January, the date at which this check was presented by Mr. Howard, that I saw. The board did not have any communication with him at all on that day in regard to this check, or otherwise. Mr. Wilkes never, at any time,
228 came before us as a board of commissioners and notified us that there was anything wrong about this check.

Cross-examination by Mr. WILKES:

Q. About this of coming before the board, don't you remember, Mr. McKee, on the 13th of January, the day following the evening when that check was brought to you, of me being before the board when the whole board were there at the table, and told you not to take into consideration, in anything you might do, this check as representing the money?

A. No, sir; you never said a word about the check as I remember.

Q. What did I come before you for?

A. That is what I asked the other members of the board after you went out.

Q. Didn't I state any reasons for my coming there?

A. As near as I could gather from the conversation, you said the board had no right to turn the money over to the bondsmen, but so far as the check was concerned I don't remember anything said about the check. The check wasn't mentioned; it was simply the question that we had no right to turn it over.

Q. I was there simply to urge upon you that you hadn't no right to turn it over to the bondsmen?

A. That is what I remember.

Q. That is all I said?

A. Yes, sir.

Q. Then I was there before you, I talked to you there?

A. Yes, sir.

Q. I understood you a moment ago I wasn't there at all?

A. Not in regard to the check.

Q. Mr. Keith asked you if I was there at all and you said no?

229 A. In reference to the check. We examined the check when Mr. Howard brought it before us on the afternoon of the 12th. I do not know as we did anything more concerning it. Mr. Wright told Mr. Howard to endorse the check, and when endorsed it would be as good as money. I won't be positive whether I or some other member of the board asked him to endorse it or not. It was either some member of the board or Mr. Wright; I won't be positive. Mr. Howard was asked to endorse the check, because of the opinion of Mr. Wright that as soon as the check was endorsed it would be as good as money. I do not know what was done with the check that afternoon. I could not state positively whether it was endorsed that night or the next morning. We did not do anything as a board concerning the check that evening. My remembrance is that after Mr. Howard brought in the check we adjourned right away until the next morning. Mr. Howard took the money and currency that he had in a tin box that evening. I do not know whether he took the check or not; I won't be positive. Mr. Bailey was there that evening. The bondsmen put in an application to be released from the bond. I would not be positive whether that evening or the next morning. I cannot remember whether Mr. Bailey presented an application to be released from the bond that evening or not. Mr. Howard was before us on the next morning, the 13th. I believe the bondsmen of Mr. Howard were there also. I think Mr. Hollister and Mr. Bailey were there. If I remember right, this money was turned over to the bondsmen that morning. I think Mr. Hollister took possession of it. It was right there on the table.

Q. Who turned it over to them? By whose authority did they take it?

230 A. Well, Howard had possession of it until they got possession of it. Mr. Howard turned it over to their possession by order of the commissioners. The box of money and the check were all there together on the table. Mr. Howard had control and custody of them until they were turned over to the bondsmen. I do not remember of meeting Mr. Wells on the morning of the 13th of January and of his warning me not to take this check in suit, because the bank would not pay it, and that Mr. Howard had diverted it from the purpose for which it was issued.

(Defendants' counsel reads to witness resolution passed by the board of commissioners January 13th.)

WITNESS: I think that resolution is a correct statement of the facts concerning that matter.

Q. At the time that Mr. Howard presented this check and the money on the evening of the 12th, Mr. Howard stood fair before you, the board of county commissioners; you had no objection against him as to his being behind with the county funds or otherwise?

A. That is as far as Howard was concerned we deemed his bondsmen insufficient.

Q. Had you known as a matter of common repute prior to this time that Mr. Howard was behind in his account with the county?

A. I had heard it before election time that he was behind, but at that time the money was right there before us.

Testimony of John Thompson (page 154, bill of exceptions):

I remember the occasion of the settlement with Mr. Howard as county treasurer. Mr. Howard presented his bank book to the board. He kept his account at that time with the First National bank. The board refused to take that in settlement, and told
231 Mr. Howard to go down and either bring up the money or a certified check. He went to the bank and brought up a letter certified, I think, by the president and cashier of the First National bank. The board would not accept of any settlement without either the money, currency, or a certified check. That is what the board insisted upon. He then went back to the bank to bring up either one or the other. He brought up a check. (Witness shown check in suit.) That is the check he brought up. We accepted that for that amount in settlement with Mr. Howard. That check was presented on the date it bears, January 12th, 1886, somewhere near 4 o'clock in the afternoon. When Mr. Howard brought the check up to us I think he laid it down on the table. The entire board was there at the *imte*. Mr. Wright was also there and I think Mr. Bailey. The check was examined by different members of the board and then referred to Mr. Wright, the county attorney, and it was pronounced good by him—equivalent to the cash or currency. I could not say what was done with the check. I do not think there was any action taken by the board concerning the check that evening. I think the board counted the money and drafts. That afternoon before Mr. Howard brought the check in we made a computation of the amount. We knew the amount of the whole thing after he brought the check up to us. After that was done I think Mr. Howard's bondsmen took charge of the money, drafts, and checks. The funds were kept in a little tin box. I am not positive whether the bondsmen took charge of it that evening or Mr. Howard. The county commissioners turned it over to the bondsmen for the reason, in the first place—the main reason was the principal bondsman, J. B. Young, had left the county and gone to California and we required additional bondsmen from Mr. Howard, and while
Mr. Howard was furnishing these additional bondsmen the
232 funds were turned over into the hands of the bondsmen of

C. K. Howard. I am not certain whether that action concerning the bond was taken by the board on the 12th or not. That was the reason the board turned over the funds to the bondsmen. I am not positive whether they turned them over that evening or not. It is my impression that they took possession of the funds that evening. The reason we had in taking possession of that money was the reason I have stated—the bondsmen petitioned to be released—the board felt that the county was not secure, as one of the bondsmen had gone away. I don't remember who took charge of the check on the evening of the 12th. I think it was on the 13th it was turned over to the bondsmen. They were turned over to the bondsmen just during the time that Howard should get additional freehold bonds—were turned over to the bondsmen by resolution of the board.

Testimony of S. T. Clover, p. 115:

I was a depositor in the Sioux Falls National bank at that time (January, 1886) and was always required by them to endorse paper. That was always a custom at that bank with me.

Testimony of Warren F. Furbeck, p. 85:

I have been engaged in the banking business about twenty-five years; in Chicago most of the time; at Sioux Falls for a year or so. The invariable custom prevalent among bankers is for depositors to endorse all paper that he puts into a bank to his account—in any bank that I have ever been connected with or ever heard of; was familiar with the banking business in Sioux Falls in 1886.

Testimony of E. M. Hills, p. 96:

Have lived at Sioux Falls about six years; was cashier of the Citizens' bank from May, 1881, to November 16th, 1886, and
233 since that time have — cashier of the Citizens' National Bank of Sioux Falls. When a check or anything that is not cash, currency, or gold is deposited it is the custom to have the depositors endorse it, unless it is a check on our own bank. It is customary to require endorsement when a check is deposited.

Testimony of R. J. Wells, p. 117:

After repeated urging for them to take it back and strongly insisting that they should do so, Mr. Norton replied that they would not do that—they could not do it—and that if we didn't pay it they knew a way to make us pay it, and that mighty quick, to-. McKinney also said that they would not charge it back and appealed to Mr. Keith, who, I think, asserted as a legal proposition that they couldn't charge it back. Mr. Wilkes also stated the same thing to them and got substantially the same answer.

Testimony of C. E. McKinney, p. 165:

At the time of the deposit of the county funds was made by the bondsmen Mr. Hollister, Mr. Coats, and Mr. Corson came to the bank and Mr. Curry and Mr. Norton, Mr. Bailey, and myself were

present. When they came in I was busy in the front part of our banking-room. I do not know as a matter of personal knowledge which way they came into the bank. When I first saw them they were in the directors' room. As I came into the room I saw them there; Mr. Hollister was standing at the desk. We counted the deposit, and as Mr. Norton came in I called him and I said, "Make out a book for this deposit;" and he went in and got a book and asked in whose name to make it out, and either Mr. Bailey or Mr. Hollister said, "Make it in the name of Hollister and the other bondsmen, as bondsmen." This check in suit was part of that deposit. He (Hollister) said, "I want this deposit as cash." I
234 said, "As far as I can see I don't see any reason why we consider it as cash—we regard this as cash." I don't think I asked Mr. Hollister to endorse any checks or drafts; those that were made payable to C. K. Howard, county treasurer, and not endorsed at all. He said they were in charge of the funds of the county treasurer and "I ought to have a right to endorse for Mr. Howard," and I think he did endorse in the name of C. K. Howard. That was the extent of it. If he did anything more than that he was not asked to. I suppose he (Hollister) claimed to deposit these funds in the character of bondsman. That is the way the deposit was made out. I simply inferred from that.

Q. Simply as bondsmen in custody of the funds of the county treasurer; that is the way you understood?

A. I think that is the way, as I remember it now. There were other checks with this one on various banks in the city, probably some ten or twelve. It was customary for quite a number of our depositors to come in at the back door. The back door opened out onto a platform leading to the public highway, Eighth street. There was a vacant space of ground running north and south by the rear door of the building, which allowed teams to come in with goods to the stores. Our bank was in the building on the corner of Phillips avenue and Eighth street. The building was forty-four feet wide and we had the inside twenty-two feet. This vacant space was on the river bank and a number of outhouses were in it. The back room of our bank was not occupied as an office; it was a sort of a vacant room where we sometimes put boxes. I do not remember whether the platform extended farther south than our building or not. The Dakota National
235 bank was located south in the same block as ours north. After I counted the money Mr. Curry took the money and put it in the front room on the counter where the telling was done and the credit was given. I think Mr. Norton brought back the book and handed it to Mr. Curry, and Currey made the credit and handed it to Hollister and the bondsmen left. I heard the testimony of Mr. Schaetzel. I did not have any such conversation in the Cataract on the 12th or 13th day of January, 1886. I had a conversation with Mr. Corson in the Cataract house in relation to the matter on the next day, the 14th. I asked him to go on the attachment bond, which he did. I do not think I had a conversation with Mr. Corson about the check on the 13th. It was one of

our busy days. At that time I don't think I knew anything about this check. I did not see these parties when they came into the bank. I was in the front part of the front room. Our directors' room and the tellers' room are all one, simply separated by this slight partition that has been referred to. It was in the directors' room where I met these parties. I think D. R. Bailey called me into that room. He was in the front part of the front office when he spoke to me. He said, Step into the back room. When I went in there Mr. Hollister first spoke to me concerning this deposit. As I stated before, he said, "I have a deposit here for you." He said, "I make it about so much. You count it over and see if I am correct," and dumped the money out on the desk, and I began counting. I assisted in counting the deposit. I don't think any one showed me this check of $16,000. I think I picked it up lying with
the other checks on the desk. I was talking with Mr. Hol-
236 lister. He stood at my right. I think I said, "This is a
nice check—a good-sized check." So far as I know, there were two or three of the checks that were not endorsed. They were not endorsed by the bondsmen, I think. I did not ask them to endorse those checks except perhaps two or three that were not endorsed by Mr. Howard.

Q. Was it your custom to require endorsement of checks deposited to the account of a depositor?

A. It depends on the shape they were in. If a man brought in a check drawn to the order of the party, we would require the endorsement of the party to whose order it was drawn, but if we knew all the parties to the check and either party brought the check in, we did not require the endorsement, and where the checks were made payable to bearer we did not. As a general rule, we did not require endorsement of checks of that kind. I did not think it was necessary to have this check endorsed. I knew all the signatures to it, and we regarded the check as good as cash. There was no talk between myself and any of these bondsmen concerning the endorsement of the check at the time it was taken on deposit. I did not ask the bondsmen for any arrangement of indemnity in case we did not get the money on the check at that time, and I don't think we ever did. I have no recollection of asking any of these depositors after payment was refused to indemnify the bank or take the check back. We did not charge the check back to them on the books of account of the bank. I do not think that any of the persons who made this deposit had any standing account with us and we had no account with them as bondsmen prior to this deposit. An entire new account was opened with them at the time of this deposit. I am not aware that any officer of our bank went
to see these bondsmen or any of them concerning this
237 check after payment was refused. I gave no instructions. I
think Mr. Hollister was the first one that spoke to me about taking this deposit made by the bondsmen. That was between two and three o'clock in the afternoon of January 13th, the time when they brought it there for deposit. Prior to that I had some conversation with D. R. Bailey. This was right after dinner. I was sit-

ting in the directors' room, where I could see the teller's desk. Mr. Bailey dropped in and I asked him where he had been the last two days. He said he had been busy; engaged, I think, in behalf of the bondsmen of C. K. Howard, getting out on the bond; that J. B. Young had left and they wished to be released, and that office had been turned over to the bondsmen with the money. I then inquired if they proposed to keep the deposit in the First National bank. He said they thought not. I asked him if he knew where they proposed to deposit, and he said he did not. I said, We would like the deposit. We want to get it, and I see no reason why Mr. Hollister hadn't just as soon deposit with us as with any of the other banks. I might have asked him how much the deposit was—the amount of funds that was turned over. If I did I think he told me. Mr. Bailey did not show me a list of what the deposit consisted of. He may have pulled out a piece of paper. I am not certain whether he made a statement concerning the deposit or not. He may have mentioned the fact of there being a cashier's check among the deposit. I don't remember whether he did or not. Mr. Bailey may have been there more than once that day before they brought in the deposit. I did not go to see the commissioners about it after learning that this was county money. I did not have any consultation with them in regard to the check. I don't think I
238 have ever seen their resolution transferring the money to the bondsmen, and I don't know as I have ever heard it read until to-day. I have heard of it. Up to that time I had received many drafts of larger amounts than this one on deposit. They were not a common occurrence, but a frequent occurrence. I do not remember that we ever took a check of that size without endorsement of the depositor. We had no official meeting concerning the taking of this check on deposit; majority of the directors were seen. I don't know as we ever before took a deposit of $27,000.00 in a tin box through the back door of the bank. The check I might have supposed came from the county treasurer. It was endorsed in his handwriting, and I probably knew it from that fact, if from no other.

Testimony of Arthur L. Curry, p. 176:

In January, 1886, I was assistant cashier of the Sioux Falls National bank. When this deposit was brought to the bank I was not in, but came in while they were there and helped Mr. McKinney count the funds. After they were counted were carried them into the front room. I was acting teller at that time and proceeded to put it on the books. (Books shown witness.) This is the cash book used at that time. It shows the entry of this deposit made in my handwriting at that time. At the left we put down the name of Hollister and the bondsmen, and charged cash $27,236.63, and credited the account to the deposit. (Bondsmen's pass book shown witness.) That is the pass book made on the occasion of that deposit. The entry is in my handwriting. I made it at that time for the purpose of giving them credit. This was the first time I ever saw or heard of the check. When we received the check we gave them

credit for it as cash. This check that was deposited with us was credited as cash. It was stated, as particularly mentioned,
239 that this was to be taken as a cash item. There was nothing said to me about it. I was acting as clerk—as teller—and the custom was to credit these items as cash. Nothing was mentioned in my hearing as to taking this as cash. This deposit was taken in the usual, ordinary course—just the same as other deposits. If checks were brought in by the party to whom they were drawn, we required an endorsement. If not brought in by the payee or drawer, it depends largely upon the check whether we would require the endorsement of the party bringing it. We were perfectly familiar with every signature on this check. It is not an invariable rule to require endorsement. This was a case where we did not require endorsement. We were satisfied to take it from any party simply on the endorsement on the back of it. We considered that by his endorsement Mr. Howard had assigned his interest in the check to the holder of it. We were to become the holder of it. That was what I was interested in—interested in getting hold of the check as a deposit. We customarily followed the law concerning the protesting of endorsed paper. We had handled such checks before. We always treated them as cash.

Q. Were they taken without endorsement?

A. I could not say how they were taken; assume they were in proper form and properly endorsed.

(*c*.) The plaintiff did not acquire the check for value.

The following is all the testimony on that point:

Testimony of C. E. McKinney, p. 165:

I think Mr. Hollister was the first one that spoke to me about taking this deposit made by the bondsmen. That was between two and three o'clock in the afternoon of January 13th, the time when they brought it there for deposit. Prior to that
240 I had some conversation with D. R. Bailey. This was right after dinner. He said he had been busy, engaged, I think, in behalf of the bondsmen of C. K. Howard, getting out the bond; that J. B. Young had left, and they wished to be released, and that office had been turned over to the bondsmen with the money. I then inquired if they proposed to keep the deposit in the First National bank. He said they thought not. I asked if he knew where they proposed to deposit, and he said he did not. I said, We would like the deposit; we want to get it, and I see no reason why Mr. Hollister hadn't just as soon deposit with us as with any of the other banks. I first saw this check when it came there to be deposited. I think Mr. Hollister carried the box and turned it over on the desk. I suppose he claimed to have the funds in the character of bondsmen. That is the way the deposit was made out. I simply inferred from that. He stated they were in charge of the funds of the county treasurer while he was getting his bond.

Q. Simply as bondsmen in custody of the funds of the county treasurer; that is the way you understand it?

A. I think that is the way, as I remember it now. Up to the time of the commencement of this suit we had paid out no money on that account. I think the money that was paid out on this deposit by us was all paid out at one time on one check. I think nothing was paid out on this account prior to January 19th. This check was part of that deposit. I ran the checks over, and when I came to this I said, "This is a good, nice check—a good-sized check." Mr. Hollister said, "Yes." I said, "That is a good check." He said, "We regard them as cash." I said, "Certainly." He said, "I want this deposit as cash." I said, "As far as I see, I don't see any
241 reason why we consider it as cash—we regard this as cash." We counted the deposit, and as Mr. Norton came in I called him and I said, "Make out a book for this deposit," and he went in and got a book and asked in whose name to make it out, and either Mr. Bailey or Mr. Hollister said, "Make it in the name of Hollislister and the other bondsmen as bondsmen." I think Mr. Norton brought back the book and handed it to Currey and Currey made the credit and handed it to Hollister, and the bondsmen left. I don't think I asked Mr. Hollister to endorse any checks or drafts. Those that were made payable to C. K. Howard, county treasurer, and not endorsed at all, he said they were in charge of the funds of the county treasurer, and "I ought to have a right to endorse for Mr. Howard," and I think he did endorse in the name of C. K. Howard. That was the extent of it. If he did anything more than that he was not asked to. There were two or three checks that were not endorsed, so far as I know. They were not endorsed by the bondsmen, I think. I did not ask any one to endorse those checks, except, perhaps, two or three that were not endorsed by Mr. Howard.

Testimony of H. L. Hollister, p. 98:

When we went into the back door of the Sioux Falls National bank I presume I said something, "I have brought you a deposit" or "here it is;" "I have brought you a deposit" or "the deposit," or something of that kind. I referred, of course, to the county deposit. It was understood that it was not my deposit. I told Mr. McKinney that it was the county funds. I was very particular about that, because I did not want it put in any other shape, only as the county. They gave me a pass book for the bondsmen and I put it in my pocket and went home. (The pass book is as follows:)

242 (On cover:)

Sioux Falls National bank, Sioux Falls, Dakota, in account with H. L. Hollister, C. G. Coats, W. H. Corson, bondsmen.

(On first page:)

Sioux Falls National bank, Sioux Falls, Dakota, in account with ——— ———, Dr.

| | | |
|---|---|---|
| Jan'y 13 | | $27,236 63 |
| 13 | | 430 00 |

I did not endorse this check and was not asked to. There were some six or seven checks included in the deposit. I endorsed the other checks. It was not a mistake, the omission to endorse this check. We were not asked to endorse it. I should think out of the whole number there was over two thousand dollars in checks, post-office orders, and all that I endorsed. I think there were five or six of them. Mr. Bailey was acting for us. He told me before we went down that he had been to see Mr. McKinney in regard to this deposit.

Q. Was there any money drawn out by you or any of the bondsmen that day—the 13th—or the next, or any change made in this account?

A. The only change made in this account was this small credit (the second item); that was currency put in for a deposit that was made.

Testimony of R. J. Wells, p. 117:

The evening of the 13th we three (C. L. Norton, W. A. Wilkes, and myself) went down to the Sioux Falls National bank,
213 and there met C. E. McKinney and H. H. Keith, one of plaintiff's attorneys. We said to Norton and McKinney in the presence of Keith that this check had been obtained from the First National bank without any consideration and had been fraudulently diverted from the purpose for which it was issued, and that now they had better charge this check back to the party from whom they got it. They admitted that they had paid nothing for it, and said that was not the way of doing things, and they proposed to make us pay it.

Testimony of Arthur Currey (p. 176):

In January, 1886, I was cashier of the Sioux Falls National bank. I was acting teller at the time and helped Mr. McKinney count the funds. After they were counted we carried them in the front room and I proceeded to put it on the books. (Books shown witness.) This is the cash book used at that time. It shows the entry of this deposit made in my handwriting at that time. At the left we put down the name of Hollister and the bondsmen and charged cash $27,236.63, and credited the account to the deposit. (Another book.) This is the individuall edger used at the time this money was checked out. It is a book of original entry.

Q. What time was this money, as testified to, checked out by the bondsmen?

A. January 19th, 1886.

(Bondsmen's pass book shown witness.) That is the pass book I made out on the occasion of that deposit. The entry is in my handwriting. I made it at that time for the purpose of giving them credit. I was present during all the time this money was
counted and participated in the counting. This was the first
214 time I ever saw or heard of the check. When we received the check we gave them credit for it as cash. This check

that was deposited with us was credited as cash. It was not stated and particularly mentioned that this was to be taken as a cash item. There was nothing said to me about it. I was acting as clerk—as teller—and the custom was to credit these items as cash. Nothing was mentioned in my hearing as to taking this as cash. This deposit was taken in the usual ordinary course, just the same as other deposits.

P. 133, Bill.

*Record of the Board of County Commissioners of Minnehaha County for January 13th, 1886.*

On motion, the following resolution was adopted:

Resolved, That the funds presented to the board of county commissioners of Minnehaha county by the treasurer, C. K. Howard, in settlement of his account with the county be, and the same *is* hereby, turned over to his bondsmen, and the bondsmen are put in charge of the office of county treasurer until the additional bond is furnished, the said funds to be deposited and remain the funds of Minnehaha county.

Same record, on January 19th, 1888:

On motion, the following resolution was adopted:

Resolved, That the bondsmen of C. K. Howard be, and they are, directed to turn over to the county commissioners of Minnehaha county, in the Territory of Dakota, all the evidences of deposit and all funds belonging to the county of Minnehaha.

The official oath and bond of Charles L. Norton, as county treasurer, was presented and, on motion, the bonds approved.

The check of the bondsmen, in the sum of $27,236.63, certified by C. E. McKinney, president of the Sioux Falls Nat. bank, in
245 full discharge of said bondsmen for the funds received by the county of Minnehaha, January 13, 1886, was accepted on the following vote: Yeas, Bannister, Thompson, and Berdahl; nays, Jones, and the funds turned over to Charles L. Norton, and the following receipt issued and signed by the said Chas. L. Norton as Co. treas:

Received from the county commissioners of the county of Minnehaha, in the Territory of Dakota, the sum of twenty-seven thousand two hundred thirty-six and $\frac{63}{100}$ dollars in currency, being the funds belonging to the county of Minnehaha.

(*d.*) The plaintiff did not acquire the check without knowledge of its actual dishonor.

The following is all the testimony on that point:

Testimony of C. F. Irvine:

Was with the First National Bank of Sioux Falls, Dakota, from May 1st, 1883, to July 1st, 1884; have been with the Dakota National bank now about seventeen months. In January, 1886, I was with the Dakota National bank; I was clerk in the Dakota National

bank. I saw the check in suit about January 12th, 1886, in the Dakota National bank. Mr. Brace, the president, came out of the back room of the bank, and he, Mr. Carpenter, the cashier, and I looked up the check together. I took the check and went across the street to the First National and presented it at the counter for payment. I presented the check to Mr. Furbeck, and he showed it to Wells, who was sitting near, and he and Wells came to the window together and Wells said, "I do not propose to pay that." I took the check then and went back to the Dakota National bank. This was in the forenoon; I should say about eleven o'clock. H. L.
246 Hollister, C. G. Coats, and D. R. Bailey were in the back room of the Dakota National bank at that time. I think Mr. Brace handed me the check. I did not state to Mr. Brace and Mr. Bailey that Wells said, when I presented the check, "We will not pay it now." I remember the exact words which Wells used.

Testimony of H. L. Hollister, p. 98:

We received the funds January 13th. This check in suit was included and a part of the funds that I have testified to and that we receipted for. When this money was turned over to us the funds were in a little trunk or box on the table. I took the trunk down to the Dakota National bank. The box containing the check and funds was left in the safe of the Dakota National bank when I went to dinner. We had offered to deposit them there. After dinner we took the box to the Sioux Falls National bank. Coats, Corson, and myself went out of the back door of the Dakota National bank and into the back door of the Sioux Falls National bank. We went there between one and 2 o'clock. Mr. Bailey was acting for us. He told me before we went down that he had been to see Mr. McKinney in regard to this deposit. I did not endorse this check, and was not asked to. I should think out of the whole number there was over $2,000.00 in checks, post-office orders and all, that I endorsed. There were six or seven checks included in this depo it. I endorsed the other checks. It was not a mistake, the omission to endorse this check. We were not asked to endorse it. Neither Mr. McKinney or any officer of the bank ever asked me to take the check back. Neither myself nor any of the bondsmen ever have been called upon to make the check good to my knowledge.

Testimony of C. G. Coats, p. 110:

I think on the 14th of January his (Howard's) bondsmen
247 took it to the Dakota National bank, together with some money in a small tin box. We afterwards carried it to the Sioux Falls National bank, I judge about two o'clock in the afternoon. Mr. Hollister and Mr. Corson, cobondsmen, were with me when we took it to the Dakota National bank. We went out of the back door of the Dakota National bank and into the back door of the Sioux Falls National bank, down the river bank. I think Mr. Bailey, after this money had been counted, said to Mr. McKinney, "That is a pretty good sized check, and you had better go and get your money on it." Mr. McKinney said he would collect it or he

would see that the doors did not open in the morning. I did not endorse the check.

Testimony of W. H. Corson, p. 125:

I never had the check in my possession. It was put into the box with other money and taken down to the Dakota National bank. This was about eleven o'clock in the morning of the 13th of January.

Q. Did Mr. Irvine take the check to the First National bank and present it for payment at your instance?

A. I think he did. After dinner, about two o'clock, the box, money, and check was taken to the Sioux Falls National bank. I was in the Dakota National bank that morning probably for an hour. The box and money was left there while we were at dinner. We did not agree to endorse the check. After or before dinner—a very short time after we came out of the Dakota National bank—Mr. Bailey met Hollister some place, and Hollister came and said to me, "The Sioux Falls National will take the check and give us credit for that amount of money." I told him it was my idea that that was the best thing we could do. We took the box and money and check down to the Sioux Falls National bank after din-
248 ner. We went out the back door of the bank and took the river route and went into the back door of the Sioux Falls National. We were in the directors' room, I suppose; it was the first room back of the bank-room proper. I don't think I could tell what was done there except counting the money. We went out as quick as we could. McKinney said if the check was not paid the bank would not open their doors to-morrow morning. I knew there was a question in regard to this check, of course. There was no caution given to me on the part of any of the bank. There was some little caution that I was to take care of myself.

Q. Don't you remember of his using an expression like this, cautioning you not to say anything about the check having been presented?

A. I think there was such a conversation, but as to when it occurred I could not tell whether at that time or some other. I know they sent for us to come down next morning. It might have been at that time or some other. Mr. McKinney sent for myself, Hollister, and Coats.

Q. Is it not a fact that he cautioned you about saying anything about the check to any one?

A. I do not recollect that Mr. McKinney cautioned us about saying nothing about the check to any one. I heard such a remark, but do not know who it came from. I know it was talked about among ourselves that we had better know as little about it as possible. I think that conversation was between some of these parties I have mentioned; am not sure whether it was in the bank or not.

249 Testimony of C. C. Carpenter, p. 130:

Have lived in Sioux Falls two years and a half, and been en-

gaged as cashier of the Dakota National bank. I know H. L. Hollister, C. G. Coats, D. R. Bailey, and W. H. Corson. They were all together in our bank about the 13th of January, 1886. After dinner I had a conversation with Hollister about getting the credit at another bank. The tin box was left in the safe during the noon hour. I think Mr. Coats took it from the bank. Bailey, Hollister, Corson, Coats, Brace, and myself were present at the time it was taken away. Mr. Brace and I took dinner at the Cataract house January 13th, 1886. Mr. McKinney was sitting at the same table with us. I had but very little conversation with Mr. McKinney. McKinney asked me if I had been up to the commissioners' room or if I had heard what they had done about settling with the county.

Testimony of George H. Brace, p. 132:

Reside at Sioux Falls, and have been president of the Dakota National bank a little over two years; was president of that bank in January, 1886; am acquainted with C. E. McKinney. At that time he was president of the Sioux Falls National bank. McKinney and I at that time boarded at the Cataract house, and were in the habit of sitting at the same table. On January 13th, 1886, about twelve o'clock noon, while we were at dinner, we had some little conversation. I think Mr. McKinney asked the question in what little conversation there was—there was not much said upon the subject—if I knew who was to get the deposit. I replied that I did not. We referred to the county treasurer's deposit. C. C. Carpenter was present at the time.

250 Testimony of Jacob Schaetzel, Jr., p. 108:

On the 13th of January, 1886, at about half past twelve or one o'clock in the afternoon, I came into the office of the Cataract house, on the corner of Phillips avenue and Ninth street. The bank is right in the southeast corner of the building. The hotel office is L shaped and surrounds two sides of the bank. There is a door from the west end of the hotel office into the bank. As I came into the office I saw Mr. McKinney and Henry Corson, I think, and one other man standing there, and I heard them talking about a check, and Mr. McKinney asked, "What is it? Is this a straight cashier's check?" and Mr. Corson—Henry, I think—said, "Yes." He says, "I would like to have it. They would either pay it or close their doors."

Cross-examination:

I signed the bond for the First National bank on the 14th of January for the release of the first attachment in this action. The conversation I heard was on the day before. I think Mr. McKinney was boarding at the Cataract house at that time.

Testimony of R. J. Wells, p. 117:

On the 13th of January, 1886, about ten o'clock, C. F. Irvine, who was then employed in the Dakota National bank, presented this check to the cashier, Furbeck. Furbeck called me to the cashier's

window, and Irvine then presented the check for payment. I refused payment and told him we would not pay it. In the afternoon of the same day C. E. McKinney presented the same check at the First National bank for payment, and payment was refused. The same afternoon C. L. Norton presented the same check for payment, and payment was again refused.

251 Testimony of S. T. Clover, p. 115:

I resided in Sioux Falls, and in January, 1886, was publishing the Sioux Falls Leader. I am acquainted with Arthur L. Currey. In January, 1886, he was assistant cashier of the Sioux Falls National bank. On Friday morning, the 15th of January, 1886, I had a conversation with him concerning the issuance of $16,000.00 by the First National Bank of Sioux Falls to C. K. Howard. He came to my office in the forenoon of the 15th and opened the conversation by asking me if I had written an article relative to the issuance of the bank check, or rather on the subject in relation to the bank check. I said that I had not; that I was investigating and trying to get the meat of the matter, and wanted to give the facts as they stood. He then said that the Sioux Falls National bank had done a great deal for me, and now was the time for me to stand by them; that it was a matter of vital importance to them, and emphasized that several times. I said I realized that, of course, but I could not give more than the facts in the case and did not propose to. He said the bank had got the check and invited me down to look at it. I did so later on. I asked him how they came by the check; how they got it. He told me that the bondsmen, in company with Mr. Bailey, came to the office of the bank on the day previous, and they had got the check, and Mr. Bailey acted for the bondsmen, and he assured them it was all right. I questioned him closely about it, and he told me that Mr. Bailey assured them that they were all right, and the First National bank would have to pay the check or they would bust the bank. I was a depositor in the Sioux Falls National bank at that time and was always required by them to endorse paper. That was always a custom at that bank with me.

252 Third. The evidence is otherwise insufficient to sustain the verdict.

The specification of particulars, in which the evidence was alleged to be insufficient to sustain the verdict, contained in the notice of intention to move for a new trial, heretofore served, as well as the several specifications of errors in law occurring on the trial and excepted to by the defendant, are hereby referred to and made a part of this motion, with the like effect as if herein more specifically stated and repeated.

II.

The verdict is against law.

WILKES & WELLS &
BOYCE & BOYCE,
*Def'ts' Att'ys.*
T. B. McMARTIN,
*Att'y for Def't, Receiver First Nat'l Bank.*

(Endorsed:) District court. The Sioux Falls Nat'l Bank, plaintiff, *vs.* The First National Bank, defendant. Wilkes & Wells, Boyce & Boyce, attorneys for def't, & T. B. McMartin, att'y for receiver def't; office and post-office address, Sioux Falls, Dakota. Supreme court of the Territory of Dakota. Filed Sep. 27, 1888. J. H. C. Young, clerk.

253 TERRITORY OF DAKOTA, } ss:
*County of Moody,* }

In District Court, Fourth Judicial District.

THE SIOUX FALLS NATIONAL BANK, Plaintiff,
*vs.*
FIRST NATIONAL BANK OF SIOUX FALLS and J. LESLIE THOMPSON, as Receiver Thereof, Defendants.

Take notice that the defendants above named intend to move the court to vacate and set aside the verdict rendered in the above-entitled action and to grant a new trial therein on the following grounds, to wit:

I.

Insufficiency of the evidence to justify the verdict in this:

First. The evidence is insufficient to sustain the verdict in that the evidence shows that the check in suit was never legally issued by and never became a valid obligation of the defendant bank because—

(*a.*) The evidence shows that at the time the check in suit was issued C. K. Howard, to whom the check was issued, was the county treasurer of Minnehaha county, was having his semi-annual settlement with the board of county commissioners, and was in default to the amount of the check.

(*b.*) The evidence shows that the check was issued without consideration and delivered to Howard upon condition that it should not be negotiated or allowed to pass out of his possession or into circulation, but would be returned in twenty minutes, and that
254 Howard would deposit some $12,000 or $14,000 to his credit as county treasurer in the bank from other county money which he had in his office as soon as his settlement was completed with the board of county commissioners.

(*c.*) The evidence shows that the check was unlawfully taken by the board of county commissioners from the custody of the treasurer and fraudulently diverted from the purpose for which it was issued.

(*d.*) The evidence tends to show that the check was given to enable Howard to effect a settlement with the board of county commissioners, and thereby to perpetrate a fraud upon the county, and at the same time to exempt himself from responsibility for his violation of law.

(*e.*) The evidence shows that the check was without any consideration; that the act of the cashier in issuing the check was an attempt to loan the credit of the bank to Howard purely as an accommodation to him.

(*f.*) The evidence tends to show that the check was obtained from the bank by a fraud practiced upon the bank by the bondsmen in pursuance of a conspiracy, to which the bondsmen were parties, to screen themselves from liability for the defalcation of the treasurer and to saddle the responsibility therefor upon the First National bank; which conspiracy was known to the board of county commissioners at the time.

(*g.*) The evidence tends to show that the check was taken from the treasurer against his will by the board of county commissioners, and delivered into the possession of his bondsmen, and by them taken to the Dakota National bank, and ther- offered for deposit, and while there was, at the instance of the bondsmen and by the direc-
255 tion of the president of that bank, presented to the First National bank for payment, and was dishonored.

Second. The evidence is insufficient to sustain the verdict in that the evidence shows that the plaintiff is not an endorsee of the check in due course, because—

(*a.*) The plaintiff did not acquire the check in good faith.

1. The evidence tends to show that the plaintiff on the day the check was issued knew that Howard was having his settlement with the board of county commissioners; that he was in default; that the check had been issued by the defendant bank for the amount of the deficiency, with the exception that it would be returned by Howard; that it had not been returned; that it was afloat; that somebody else would probably get it away from the First National bank.

2. That before it acquired the check the plaintiff knew that the county commissioners had taken possession of the check; that Howard's bondsmen had made application to the board to be released; that the board had turned the check over to the bondsmen; that the bondsmen would not deposit the same with the First National bank; that the deposit offered to the plaintiff, including the check, was the county deposit; that the depositors were the bondsmen, and offered it for deposit as such bondsmen; that the check was issued without consideration as an accommodation to Howard to enable him to effect a settlement with the board and perpetrate a fraud upon the county, and at the same time to exempt himself from responsibility for his violation of law; that the plaintiff knew that the check had been dishonored before it acquired the same.

256 3. That plaintiff before it parted with any value upon said check had full knowledge from defendant bank that the check was issued without consideration; that it had been conditionally delivered; that the conditions of said delivery had been violated, and the check fraudulently diverted from the purpose for which it was issued, and that the bank would persist in its refusal to pay the check and defend against the collection of it, and plaintiff was requested to charge the amount back and return the check to the persons from whom it received the same.

(*b.*) The plaintiff did not acquire in the ordinary course of business, in that—

The evidence shows the check was payable to and endorsed by Howard, as county treasurer; the bondsmen deposited the check

in their own names as bondsmen; plaintiff knew the money and check were the county funds, took the check without the endorsement of the parties who deposited it, received it through the back door of the bank, and counted and examined it in the back room of the bank. The deposit was entirely outside of the usual course of banking business.

(*c.*) The plaintiff did not acquire the check for value in this, that the evidence tends to show that the check was received by the plaintiff from the bondsmen as an ordinary deposit for collection; that the plaintiff only issued a pass book for it to the depositors as bondsmen, and the evidence is undisputed that the plaintiff did not pay out any money or part with any value on account of the check or the deposit of it until after the commencement of this action and until after full knowledge of all the facts concerning the issuance and dishonor of the check.

257 (*d.*) The plaintiff did not acquire the check without knowledge of its actual dishonor.

Third. The evidence is otherwise insufficient to sustain the verdict.

II.

The verdict is against law.

III.

Error in law occurring at the trial and excepted to by the defendants:

1st. The court erred in refusing to permit the witness, Furbeck, to answer the question whether it was a common occurrence to find checks of the amount and like the one in suit in the business of the Sioux Falls banks.

2nd. The court erred in admitting in evidence against the objections of defendant the statement Exhibit "B," as follows:

"FIRST NATIONAL BANK, SIOUX FALLS, DAKOTA.

"The books of the bank show a credit in favor of the county of $15,625.01. If you wish, you — the privilege of examining the books.

"R. J. WELLS, *Pt.*
"W. F. FURBECK, *Cas.*"

3rd. The court erred in refusing to permit the witness, Furbeck, to answer the question whether the check in suit was ever charged up in the cashier's check account.

4th. The court erred in refusing the offer of defendants to introduce in evidence the stub of the check in suit and the record made thereon.

5th. The court erred in refusing the offer of the defendants to show by the witness, Hollister, that the bondsmen of Howard knew that he was behind in his accounts and had been
258 defaulter for a number of years prior to this settlement; that Hollister, as cashier of the defendant bank, had at many of the settlements in January and July of each year taken money or

checks to the commissioners when Howard was a defaulter; that he expected the officers of the defendant bank would at this time follow that custom and present a check to the commissioners, and that he and the other bondsmen would then step in and ask the commissioners to turn the funds over to them.

6th. The court erred in refusing the offer of the defendants to show by the same witness that the Dakota National bank when the check was offered to it for deposit refused to receive or give credit or purchase the check without the endorsement or indemnity of the bondsmen, and that an arrangement was then partially entered into for such indemnity and to deposit the funds, and that it was finally arranged that if the plaintiff did not take the check without endorsement the bondsmen would bring it back to the Dakota National bank.

7th. The court erred in refusing the defendants' offer to show by the same witness that the president of the plaintiff called for the witness to come down and see him, and in that conversation wanted the witness to help defray the expenses of this suit, and said, "I have helped you out, and you had better help me out."

8th. The court erred in refusing to permit the witness to answer the question, "Did you ever receive a check of $16,000.00 as a banker without endorsement by the party presenting it?"

9th. The court erred in refusing to permit the witness Porter P. Peck to answer the following questions: "How often in your experience as a banker in Sioux Falls have you handled an individual check of the amount of $16,000.00?"

259 10th. The court erred in refusing to permit the witness Corson to answer the following question: "Was anything said at the Dakota National bank about your giving a bond of indemnity?" Also the following question: "Did you know the state of Mr. Howard's account—of his being in default with the county treasury?"

11th. The court erred in refusing to permit the witness Carpenter to answer the following question: "Now, Mr. Carpenter, will you please state in your own words what took place at the time you saw them there together? And if they had any business with the bank please state it."

12th. The court erred in overruling each and every of the several exceptions taken and filed in writing by defendants to the testimony of the witness Howard.

12½. The court erred in receiving any testimony of this witness concerning this bank book, the statement to the county board, and the Stevers drafts & his note.

13th. The court erred in permitting the following testimony from the witness Thompson:

Q. What next occurred? A. The board refused to take that (the bank book) in settlement, and told Mr. Howard to go down and either bring up the money or a certified check. Q. What did he do? A. He went back to the bank and he brought up a letter, certified, I think, by both the president and cashier of the First National.

14th. The court erred in permitting the witness McKee to testify

in regard to Howard's presenting to the county board his bank book and the statement of the president and cashier of the defendant bank.

260 15th. The court erred in refusing defendants' motion to strike out the testimony of C. E. McKinney that he treated cashier's checks of the defendant bank as cash.

16th. The court erred in granting plaintiff's motion to direct a verdict in favor of the plaintiff.

17th. The court erred in directing a verdict in favor of the plaintiff.

Said motion will be made upon the minutes of the court and — the hearing thereof reference will be had to the pleadings and orders of the court on file, the stenographic report of the testimony, and the depositions, documentary evidence, and other papers used on the trial.

WILKES & WELLS AND
BOYCE & BOYCE,
*Attorneys for Defendant The First National Bank.*
T. B. McMARTIN,
*Attorney for the Defendant J. Leslit Thompson, as Receiver.*

To Messrs. H. H. Keith, C. H. Winsor, and Bailey & Davis, attorneys for plaintiff.

(Endorsed:) District court, Moody county. The Sioux Falls National Bank, plaintiff, against The First National Bank of Sioux Falls and J. Leslie Thompson, as receiver, &c., defendants. Notice of intention to move for new trial. Due service of the within admitted this 22 day of August, A. D. 1887. H. H. Keith, attorney for plaintiff. Wilkes & Wells and Boyce & Boyce, attorneys for def't b'k. T. B. McMartin, att'y for J. Leslie Thompson, receiver, &c. Supreme court of the Territory of Dakota. Filed Sep. 27, 1888. J. H. C. Young, clerk.

261 TERRITORY OF DAKOTA, } ss:
*County of Moody,* }

In District Court, Fourth Judicial District.

THE SIOUX FALLS NATIONAL BANK, Plaintiff,
*vs.*
THE FIRST NATIONAL BANK OF SIOUX FALLS and J. LESLIE THOMPSON, as Receiver of the First National Bank of Sioux Falls, Defendants.

The motion for new trial in the above-entitled action having been brought on for a hearing, and it appearing to the satisfaction of the court that due and proper notice of intention to move for new trial, as well as due and proper notice of the hearing of the motion for new trial, have been given by the defendants' attorneys at the proper time, and after hearing the counsel for the respective parties, and being fully advised in the premises, it is ordered—

That the motion of defendants for a new trial of the above-entitled action be, and the same is hereby, overruled.

Dated Sioux Falls, D. T., April 13, 1888.

By the court:

JAMES SPENCER, *Judge.*

To the foregoing order the defendants' counsel at the proper time duly excepted, and said exception is hereby allowed and settled.

JAMES SPENCER, *Judge.*

(Endorsed:) Supreme court of the Territory of Dakota. Filed Sep. 27, 1888. J. H. C. Young, clerk.

262 TERRITORY OF DAKOTA, } ss:
*County of Moody,* }

In District Court, Fourth Judicial District.

THE SIOUX FALLS NATIONAL BANK, Plaintiff,
*vs.*
THE FIRST NATIONAL BANK OF SIOUX FALLS and J. LESLIE THOMPSON, as Receiver of the First National Bank of Sioux Falls, Defendants.

The foregoing bill of exceptions having been this day presented for settlement, and it appearing the due and proper service of the same and of the notice of settlement thereof has been made upon plaintiff, and that the same was served and presented within the time fixed by the court for that purpose, and it appearing that the same is conformable to the truth, it is ordered that said bill of exceptions be, and the same is hereby, settled and allowed, and that the same be filed and made a part of the record; and I hereby certify that said bill of exceptions contains all the evidence adduced upon the trial of said cause.

Dated this 13 day of April, A. D. 1888.

JAMES SPENCER, *Judge.*

(Endorsed:) Supreme court of the Territory of Dakota. Filed Sep. 27, 1888. J. H. C. Young, clerk.

263 TERRITORY OF DAKOTA, } ss:
*County of Moody,* }

In District Court, Fourth Judicial District.

THE SIOUX FALLS NATIONAL BANK, Plaintiff,
*vs.*
FIRST NATIONAL BANK OF SIOUX FALLS and J. LESLIE THOMPSON, as Receiver Thereof, Defendants.

*Assignment of Errors.*

And the appellant herein says there is manifest error on the face of the record in this:

1. The court erred in overruling defendant Thompson's motion

to be substituted as party defendant in the action and in ordering said Thompson to be made an additional party defendant.

2. The court erred in refusing to permit the witness Furbeck to answer the question whether it was a common occurrence to find checks of the amount and like the one in suit in the business of Sioux Falls banks.

3. The court erred in admitting in evidence, against the objection of defendants, the statement, Exhibit "B," as follows:

"FIRST NATIONAL BANK, SIOUX FALLS, DAKOTA.

"The books of the bank show a credit in favor of the county of $15,625.01. If you wish, you have the privilege of examining the books.

"R. J. WELLS, *P't.*
"W. F. FURBECK, *Cas.*"

4. The court erred in refusing to permit the witness Furbeck to answer the question whether the check in suit was ever charged up in the cashier's check account.

264 5. The court erred in refusing the offer of the defendants to show by the witness Hollister that the bondsmen of Howard knew that he was behind in his accounts and had been defaulter for a number of years prior to this settlement; that Hollister, as cashier of the defendant bank, had, at many of the settlements in January and July of each year, taken money or checks to the commissioners when Howard was a defaulter; that he expected the officers of the defendant bank would at this time follow that custom and present a check to the commissioners, and that he and the other bondsmen would then step in and ask the commissioners to turn the funds over to them.

6. The court erred in refusing the offer of the defendants to show by the same witness that the Dakota National bank, when the check was offered to it for deposit, refused to receive or give credit or purchase the check without the endorsement or indemnity of the bondsmen, and that an arrangement was then partially entered into for such indemnity and to deposit the funds, and that it was finally arranged that if the plaintiff did not take the check without endorsement the bondsmen would bring it back to the Dakota National bank.

7. The court erred in refusing the defendants' offer to show by the same witness that the president of the plaintiff called for the witness to come down and see him, and in that conversation wanted the witness to help defray the expenses of this suit, and said, "I have helped you out, and you had better help me out."

8. The court erred in refusing to permit the witness to answer the question, "Did you ever receive a check of $16,000, as a banker, without endorsement by the party presenting it?"

9. The court erred in refusing to permit the witness Porter P. Peck to answer the following questions: "How often in your
265 experience as a banker in Sioux Falls have you handled an individual check of the amount of $16,000?"

10. The court erred in refusing to permit the witness Corson to answer the following question: "Was anything said at the Dakota National bank about your giving a bond of indemnity?" Also the following question: "Did you know the state of Mr. Howard's account—of his being in default with the county treasury?"

11. The court erred in overruling each and every of the several exceptions taken and filed in writing by defendants to the testimony of the witness Howard.

12. The court erred in receiving any testimony of this witness concerning this bank book, the statement to the county board, and the Stevers drafts and his note.

13. The court erred in permitting the following testimony from the witness Thompson:

Q. What next occurred? A. The board refused to take that (the bank book) in settlement, and told Mr. Howard to go down and either bring up the money or a certified check.

Q. What did he do? A. He went back to the bank and he brought up a letter certified, I think, by both president and cashier of the First National.

14. The court erred in permitting the witness McKee to testify in regard to Howard's presenting to the county board his bank book and the statement of the president and cashier of the defendant bank.

15. The court erred in refusing defendants' motion to strike out the testimony of C. E. McKinney that he treated cashier's checks of the defendant bank as cash.

16. The court erred in granting plaintiff's motion to direct
266 a verdict in favor of the plaintiff.

17. The court erred in directing a verdict in favor of the plaintiff.

18. The court erred in overruling defendants' motion for new trial.

19. The court erred in rendering judgment upon the verdict.

T. B. McMARTIN,
*Att'y for J. Leslie Thompson,*
*Receiver 1st National Bank, Defendant and Appellant.*

(Endorsed:) District court, Territory of Dakota, county of Moody. The Sioux Falls National Bank, plaintiff, *vs.* The First National Bank of Sioux Falls, Dakoka, and J. Leslie Thompson, as receiver thereof, defendants. Assignment of errors. T. B. McMartin, attorney for def't Thompson, Sioux Falls, Dak. Supreme court of the Territory of Dakota. Filed Sep. 27, 1888. J. H. C. Young, clerk.

(Endorsed:) Nos. 443, 444, and 445 (3 cases). Supreme court of the Territory of Dakota. Filed Sep. 27, 1888. J. H. C. Young, clerk.

267 File No. 443.

THE UNITED STATES OF AMERICA, *Territory of Dakota*, } ss:

In Supreme Court, October Term, A. D. 1888.

Appeal from the district court of Moody county.

THE SIOUX FALLS NATIONAL BANK, Plaintiff and Respondent,
*vs.*
THE FIRST NATIONAL BANK OF SIOUX Falls, Dakota, and J. Leslie Thompson, as Receiver of the First National Bank of Sioux Falls, Dakota, Defendant- and Appellant-.

Appeal from Order Making Receiver an Additional Party.

This appeal coming on to be heard at the October, A. D. 1888, term of this court, at the supreme court room, in the city of Deadwood, Territory of Dakota—present, Bartlett Tripp, chief justice, and William B. McConnell, Charles M. Thomas, James Spencer, John E. Carland, and Roderick Rose, associate justices—and the appeal herein having been argued by T. B. McMartin, Esq., for the appellant-, and by H. H. Keith, Esq., for respondent, and the court having advised thereon, it is now here considered, ordered, and adjudged that the order of the said district court within and for said Moody county appealed from herein be, and the same is hereby, modified in so far as the court made the receiver an additional party, and it is ordered and adjudged that s'd J. Leslie Thompson be substituted as defendant in place of the said First National Bank, def't.

And it is further ordered that this cause be, and it is hereby, remanded to the district court for further proceedings according to law, and with instructions to enter judgment in accordance with the judgment of this court.

By the court:

BARTLETT TRIPP,
*Chief Justice.*

268 (Endorsed:) File No. 443. In supreme court, Territory of Dakota, October term, 1888. The Sioux Falls National Bank, plaintiff and respondent, *vs.* The First National Bank of Sioux Falls, Dakota, defendant, and J. Leslie Thompson, as receiver of the First National Bank of Sioux Falls, Dakota, defendant and appellant. Filed in open court this 13th day of October, 1888. J. H. C. Young, clerk.

(285.)

(See 444 and 445.)

269 THE SIOUX FALLS NATIONAL BANK
*vs.*
1ST NATIONAL BANK OF SIOUX FALLS and J. LESLIE THOMPSON. } 28 443, 29 444, 30 445.

The judgment in the principal case is affirmed. The court holds—

1. The court erred in denying the motion of the receiver to be substituted as sole def't in the action.

2. The appeal taken by the def't bank after appointment of the receiver from the order refusing to dissolve the attachment was unauthorized and must be dismissed.

3. The cashier's check sued upon in this action upon its delivery to Howard as treasurer immediately became the property of the county, and the def't bank could not be heard to assert its want of power to issue the check or the existance of any fact which might be a defense between itself and Howard in his individual capacity; and the pl'ff bank having by the transfer succeeded to all the rights of the county, there was no error in directing the verdict of the jury.

270 File No. 444.

THE UNITED STATES OF AMERICA, *Territory of Dakota*, } *ss*:

In the Supreme Court, October Term, A. D. 1888.

Appeal from the district court of Moody county.

THE SIOUX FALLS NATIONAL BANK, Plaintiff and Respondent,
*vs.*
THE FIRST NATIONAL BANK OF SIOUX FALLS, Dakota, and J. Leslie Thompson, as Receiver of the First National Bank of Sioux Falls, Dakota, Defendants and Appellants. } Appeal from Order Refusing to Set Aside Attachment.

This appeal coming on to be heard at the October, A. D. 1888, term of this court, at the supreme court room, in the city of Deadwood, Territory of Dakota—present, Bartlett Tripp, chief justice, and William B. McConnell, Charles M. Thomas, James Spencer, John E. Carland, and Roderick Rose, associate justices—and the appeal herein having been argued by F. L. Boyce, Esq., and W. A. Wilkes, Esq., for the appellants, and by H. H. Keith, Esq., and W. R. Steele, Esq., for respondent, and the court having advised thereon, it is now here considered, ordered, and adjudged that the order of the said district court within and for said Moody county, appealed from herein, be, and the same is hereby, dismissed.

And it is further ordered that this cause be, and it is hereby, remanded to the district court for further proceedings according to law and the judgment of this court.

And it is further considered and adjudged that plaintiff and respondent have and recover of the defendants and appellants costs

and disbursements on this appeal expended, taxed and
271 allowed at twenty-five $\frac{00}{100}$ dollars.

By the court:

BARTLETT TRIPP,
*Chief Justice.*

All concur, Chief Justice Tripp not sitting.

(Endorsed:) File No. 444. In supreme court, Territory of Dakota, October term, 1888. The Sioux Falls National Bank, plaintiff and respondent, *vs.* The First National Bank of Sioux Falls, Dakota, and J. Leslie Thompson, as receiver of the First National Bank of Sioux Falls, Dakota, defendant- and appellant-. Filed in open court this 13 day of October, 1888. J. H. C. Young, clerk.

(286.)
(See 443 and 445.)

272 THE SIOUX FALLS NATIONAL BANK
*vs.*
1ST NATIONAL BANK OF SIOUX FALLS and J. LESLIE THOMPSON. } 28 443, 29 444, 30 445.

The judgment in the principal case is affirmed.

The court holds—

1. The court erred in denying the motion of the receiver to be substituted as sole def't in the action.

2. The appeal taken by the def't bank after appointment of the receiver from the order refusing to dissolve the attachment was unauthorized and must be dismissed.

3. The cashier's check sued upon in this action upon its delivery to Howard as treasurer immediately became the property of the county and the def't bank could not be heard to assert its want of power to issue the check or the existence of any fact which might be a defense between itself and Howard in his individual capacity; and the pl'ff bank having by the transfer succeeded to all the rights of the county, there was no error in directing the verdict of the jury.

273 File No. 445.

THE UNITED STATES OF AMERICA, *Territory of Dakota,* } *ss.:*

In the Supreme Court, October Term, A. D. 1888.

Appeal from the district court of Moody county.

THE SIOUX FALLS NATIONAL BANK, Plaintiff and Respondent,
*vs.*
THE FIRST NATIONAL BANK OF SIOUX FALLS, DAKOTA, and J. LESLIE THOMPSON, as Receiver of the First National Bank of Sioux Falls, Dakota, Defendants and Appellants.

This action coming on to be heard at the October, A. D. 1888, term of this court, at the supreme court room, in the city of Dead-

wood, Territory of Dakota—present, Bartlett Tripp, chief justice, and William B. McConnell, Charles M. Thomas, James Spencer, John E. Carland, and Roderick Rose, associate justices—and the appeal herein having been argued by F. L. Boyce, Esq., and W. A. Wilkes, Esq., for the appellant-, and by H. H. Keith, Esq., and W. R. Steele, Esq., for respondent, and the court having advised thereon, it is now here considered, ordered, and adjudged that the judgment of the said district court within and for said Moody county, appealed from herein, be, and the same is hereby, in all things affirmed.

And it is further ordered that this cause be, and it is hereby, remanded to the district court for further proceedings according to law and the judgment of this court.

And it is further considered and adjudged that respondent have and recover of the appellants its costs and disbursements on this appeal expended, taxed and allowed at seventy-nine $\frac{00}{100}$ dollars.

274 By the court:

BARTLETT TRIPP,
*Chief Justice.*

All concur, Justice Spencer not sitting.

(Endorsed:) File No. 445. In supreme court, Territory of Dakota, October term, 1888. The Sioux Falls National Bank, plaintiff and respondent, *vs.* The First National Bank of Sioux Falls, Dakota, and J. Leslie Thompson, as receiver of the First National Bank of Sioux Falls, Dakota, defendant- and appellant-. Filed in open court this 13th day of October, 1888. J. H. C. Young, clerk.

(287.)
(See 443 and 444.)

275 THE SIOUX FALLS NATIONAL BANK *vs.* 1ST NATIONAL BANK OF SIOUX FALLS and J. LESLIE THOMPSON. } No. 28. $\frac{28}{443}$, $\frac{29}{444}$, $\frac{30}{445}$.

The judgment in the principal case is affirmed.

The court holds—

(1.) The court erred in denying the motion of the receiver to be substituted as sole def't in the action.

(2.) The appeal taken by the def't bank, after appointment of the receiver, from the order refusing to dissolve the attachment was unauthorized and must be dismissed.

(3.) The cashier's check sued upon in this action upon its delivery to Howard as treasurer immediately became the property of the county and the def't bank could not be heard to assert its want of power to issue the check or the existence of any fact which might be a defense between itself and Howard in his individual capacity; and the pl'ff bank having by the transfer succeeded to all the rights of the county, there was no error in directing the verdict of the jury.

276 Supreme Court of the United States.

J. LESLIE THOMPSON, as Receiver of the First National Bank of Sioux Falls, and The First National Bank of Sioux Falls, Dakota, Plaintiffs in Error,
*vs.*
THE SIOUX FALLS NATIONAL BANK OF SIOUX FALLS, DAKOTA, Defendants in Error.

Petition for Writ of Error.

The above-named plaintiffs in error respectfully represent to the court that a manifest error hath happened to their great damage in the record and proceedings, as also in the rendition of the judgment of a plea which is in the supreme court of the Territory of Dakota, between the said Sioux Falls National Bank of Sioux Falls, Dakota, as respondent, and these petitioners as appellants, said judgment having been rendered by said supreme court of said Dakota Territory in favor of defendant in error and against these petitioners;

And your petitioners further represent that on advising the Comptroller of the Currency of the United States of the judgment above mentioned the said petitioner, J. Leslie Thompson, as receiver as aforesaid, was by the said Comptroller of the Currency directed to take out a writ of error herein.

Wherefore your petitioners pray that a writ of error may issue out of this court to the said supreme court of the Territory of Dakota, according to law, so that this court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

T. B. McMARTIN &
WILKES & WELLS AND
BOYCE & BOYCE & T. W. NOYES,
*Attorneys for Plaintiff in Error, J. Leslie Thompson, as Receiver, &c.*

277 WM. A. WILKES, ROLLIN J. WELLS AND
BOYCE & BOYCE & T. W. NOYES,
*Attorneys for Plaintiff in Error, The First National Bank of Sioux Falls, Dakota.*

(Endorsed:) Supreme court of the Territory of Dakota. Filed Dec. 16, 1888. J. H. C. Young, clerk.

278 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the chief justice and associate justices of the supreme court of the Territory of Dakota, Greeting:

Because in the record and proceedings, as also in the rendition of judgment of a plea which is in the said supreme court, before you or some of you, between J. Leslie Thompson, as receiver of the First National Bank of Sioux Falls, Dakota, and The First National Bank of Sioux Falls, Dakota, plaintiffs in error, and The Sioux Falls National Bank of Sioux Falls, Dakota, defendant in error, a manifest error hath happened, to the great damage of the said J. Leslie Thomp-

son as receiver, &c., and the said First National Bank of Sioux Falls, Dakota, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 12th day of December, in the year of
279 our Lord one thousand eight hundred and eighty-eight.

[SEAL.] J. H. C. YOUNG,
*Clerk of the Supreme Court of the Territory of Dakota.*

Allowed by—
BARTLETT TRIPP,
*Chief Justice of the Supreme Court of the Territory of Dakota.*

(Endorsed:) Supreme court of the Territory of Dakota. Filed Dec. 16, 1888. J. H. C. Young, clerk.

280 THE UNITED STATES OF AMERICA:

To the Sioux Falls National Bank of Sioux Falls, Dakota, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of Dakota, wherein J. Leslie Thompson, as receiver of the First National Bank of Sioux Falls, Dakota, and The First National Bank of Sioux Falls, Dakota, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Bartlett Tripp, chief justice of the supreme court of the Territory of Dakota, this 12th day of December, in the year of our Lord one thousand eight hundred and eighty-eight.

BARTLETT TRIPP,
*Chief Justice of the Supreme Court of the Territory of Dakota.*

TERRITORY OF DAKOTA, } ss:
*County of Minnehaha,* }

On this 19th day of December, in the year of our Lord one thousand eight hundred and eighty-eight, personally appeared T. B. McMartin before me, the subscriber, a notary public in and for said

county and Territory, and makes oath that he delivered a true copy of the within citation to H. H. Keith, who is attorney for plaintiff and appellee, The Sioux Falls National Bank of Sioux Falls,
281 Dakota, by delivering to and leaving with said H. H. Keith a true and correct copy of the within citation.

T. B. McMARTIN.

Sworn to and subscribed the 19th day of December, A. D. 1888.

[SEAL.] E. W. HARVEY,
*Notary Public, D. T.*

(Endorsed:) Personal service is hereby admitted of the within this 19th day — December, A. D. 1888, by receiving copy of the within at Sioux Falls, Dakota Territory. H. H. Keith, att'y for the Sioux Falls National bank. Supreme court of the Territory of Dakota. Filed Dec. 23, 1888. J. H. C. Young, clerk.

282 In the Supreme Court of the Territory of Dakota.

THE SIOUX FALLS NATIONAL BANK, Plaintiff & Respondent,
*vs.*
THE FIRST NATIONAL BANK OF SIOUX FALLS, DAKOTA, and J. Leslie Thompson, as Receiver of the First National Bank of Sioux Falls, Dakota, Defendants & Appellants.

*Statement of Costs and Disbursements.*

| | |
|---|---|
| Before argument | $5 00 |
| For argument | 15 00 |
| Cost of printing plaintiff's abstract (5 p.) | 5 00 |
| Clerk's fees in supreme court (to be added) | |
| | $25 00 |
| Taxed at my office this 21 day of December, 1888, and allowed at | $25 00 |

TERRITORY OF DAKOTA, } ss:
*County of Minnehaha,* }

H. H. Keith, being duly sworn, says that he is attorney for the plaintiff and respondent in the above-entitled action, and that the costs and disbursements above mentioned have been or will be necessarily incurred in this action to the best of deponent's knowledge and belief.

H. H. KEITH.

Subscribed and sworn to before me this 19th day of December, 1888.

C. P. BATES,
[SEAL.] *Notary Public, Dakota.*

You will please to take notice that the above and foregoing is a statement of the items of the plaintiff'- and respondent'- costs and dis-

bursements in this action, and that the same will be adjusted
283 and taxed by the clerk of this court at his office, in the city of Yankton, Territory of Dakota, on the 24th day of December, 1888, at ten o'clock a. m.

Yours, &c.,

H. H. KEITH,
*Att'y for Respondent.*

To Wilkes & Wells and Boyce & Boyce, attorneys for appellants.

Costs and disbursements in above-entitled cause taxed and allowed at twenty-five $\frac{00}{100}$ dollars.

Done at Yankton, Dec'r 21, 1888.

J. H. C. YOUNG, *Clerk.*

(Endorsed:) No. 444. Supreme court, Territory of Dakota. Sioux Falls National Bank against First National Bank and J. Leslie Thompson. Statement of costs and disbursements. H. H. Keith, attorney for respondent, Sioux Falls, Dakota. We admit due and personal service of the within notice, statement, and affidavit upon us, made at Sioux Falls, D. T., on this 19th day of December, 1888. Boyce & Boyce and Wilkes & Wells, attorneys for appellant-. Supreme court of the Territory of Dakota. Filed Dec. 22, 1888. J. H. C. Young, clerk.

284 In the Supreme Court of the Territory of Dakota.

THE SIOUX FALLS NATIONAL BANK, Plaintiff & Respondent,
*vs.*
THE FIRST NATIONAL BANK OF SIOUX FALLS, DAKOTA, and J. Leslie Thompson, as Receiver of the First National Bank of Sioux Falls, Dakota, Defendants & Appellants.

*Statement of Costs and Disbursements.*

| | |
|---|---|
| Before argument | $5 00 |
| For argument | 15 00 |
| Cost of printing brief (59 pages) | 59 00 |
| Clerk's fees in supreme court (to be added) | |
| | $79 00 |
| Taxed at my office this 21 day of December, 1888, and allowed at | $79 00 |

TERRITORY OF DAKOTA, } ss:
*County of Minnehaha,* }

H. H. Keith, being duly sworn, says that he is attorney for the plaintiff and respondent in the above-entitled action, and that the costs and disbursements above mentioned have been or will be necessarily incurred in this action to the best of deponent's knowledge and belief.

H. H. KEITH.

Subscribed and sworn to before me this 19th day of December, 1888.

C. P. BATES
*Notary Public, Dakota.*

[SEAL.]

You will please to take notice that the above and foregoing is a statement of the items of the plaintiff'- and respondent'-
285 costs and disbursements in this action, and that the same will be adjusted and taxed by the clerk of this court at his office, in the city of Yankton, Territory of Dakota, on the 24th day of December, 1888, at ten o'clock a. m.

Yours, &c.,

H. H. KEITH,
*Attorney for Respondent.*

To T. B. McMartin, Esq., att'y for app'l't receiver, and Wilkes & Wells & Boyce & Boyce, att'ys for app'l't First Nat. Bank.

Costs and disbursements in above-entitled cause taxed and allowed at seventy-nine $\frac{00}{100}$ dollars.

Done at Yankton, Dec'r 21, 1888.

J. H. C. YOUNG, *Clerk.*

(Endorsed:) No. 445. Supreme court, Territory of Dakota. Sioux Falls National Bank against First National Bank and J. Leslie Thompson. Statement of costs and disbursements. H. H. Keith, attorney for respondent, Sioux Falls, Dakota. We admit due and personal service of the within notice, statement, & affidavit upon us, made at Sioux Falls, D. T., on this 19th day of December, 1888. T. B. McMartin, attorney for appellant J. Leslie Thompson, receiver, &c. Wilkes & Wells and Boyce & Boyce, att'ys for appellant First National Bank of Sioux Falls, Dak. Supreme court of the Territory of Dakota. Filed Dec. 22, 1888. J. H. C. Young, clerk.

286 UNITED STATES OF AMERICA, } ss:
*Territory of Dakota,* }

In Supreme Court.

Cause:

THE SIOUX FALLS NATIONAL BANK, Plaintiff and Respondent,
*vs.*
THE FIRST NATIONAL BANK OF SIOUX FALLS, DAKOTA, Defendant; J. Leslie Thompson, Receiver of the First National Bank of Sioux Falls, Dakota, Defendant and Appellant.

Filed September 27, 1888.

*Journal Entries.*

In Supreme Court, October Term, A. D. 1888.

Tuesday, October 2, 1888, being the first day of the term.

* * * * * * *

On call of calendar.

* * * * * * *

In—

THE SIOUX FALLS NATIONAL BANK, Plaintiff and Respondent,
*vs.*
THE FIRST NATIONAL BANK OF SIOUX FALLS, DAKOTA, Defendant; J. Leslie Thompson, as Receiver of the First National Bank of Sioux Falls, Dakota, Defendant & Appellant.

Counsel answers for argument.

* * * * * * *

Friday, October 5, 1888, being the fourth day of the term.

* * * * * * *

287 In—

THE SIOUX FALLS NATIONAL BANK, Plaintiff & Respondent,
*vs.*
THE FIRST NATIONAL BANK OF SIOUX FALLS, Defendant, and J. Leslie Thompson, as Receiver of the First National Bank of Sioux Falls, Dakota, Defendant & Appellant.

Cause argued.

Saturday, October 13, 1888, being the eleventh day of the term.

* * * * * * *

In—

THE SIOUX FALLS NATIONAL BANK, Plaintiff and Respondent,
*vs.*
THE FIRST NATIONAL BANK OF SIOUX FALLS, DAKOTA, Defendant, and J. Leslie Thompson, as Receiver of the First National Bank of Sioux Falls, Dakota, Defendant & Appellant.

The order of the district court within and for said Moody county appealed from herein be, and the same is hereby, modified in so far as the court made the receiver an additional party, and it is ordered and adjudged that said J. Leslie Thompson be substituted as defendant in place of the said First National Bank, defendant.

288 UNITED STATES OF AMERICA,
*Territory of Dakota.*

In Supreme Court.

Cause:

THE SIOUX FALLS NATIONAL BANK, Plaintiff & Respondent,
*vs.*
THE FIRST NATIONAL BANK OF SIOUX FALLS, DAKOTA, and J. Leslie Thompson, as Receiver of the First National Bank of Sioux Falls, Dakota, Defendants and Appellants.

Filed September 27, 1888.

*Journal Entries.*

In Supreme Court, October term, A. D. 1888.

Tuesday, October 2, 1888, being the first day of the term.

* * * * * * *

On call of calendar.

* * * * * * *

In—

THE SIOUX FALLS NATIONAL BANK, Plaintiff & Respondent,
*vs.*
THE FIRST NATIONAL BANK OF SIOUX FALLS, DAKOTA, and J. Leslie Thompson, as Receiver of the First National Bank of Sioux Falls, Dakota, Defendant- and Appellant-.

Counsel answers for argument.

* * * * * * *

Friday, October 5, 1888, being the fourth day of the term.

* * * * * * *

289 In—

THE SIOUX FALLS NATIONAL BANK, Plaintiff and Respondent,
*vs.*
THE FIRST NATIONAL BANK OF SIOUX FALLS, DAKOTA, and J. Leslie Thompson, as Receiver of the First National Bank of Sioux Falls, Dakota, Defendant- and Appellant-.

Cause argued.

Saturday, October 13, 1888, being the eleventh day of the term.

* * * * * * *

In—

THE SIOUX FALLS NATIONAL BANK, Plaintiff and Respondent,
*vs.*
THE FIRST NATIONAL BANK OF SIOUX FALLS, DAKOTA, and J. Leslie Thompson, as Receiver of the First National Bank of Sioux Falls, Dakota, Defendant- and Appellant-.

The order of the district court within and for said Moody county appealed from herein be, and the same is hereby, dismissed.

200 UNITED STATES OF AMERICA, *Territory of Dakota*, } *ss:*

In Supreme Court.

Cause:

THE SIOUX FALLS NATIONAL BANK, Plaintiff and Respondent,
*vs.*
THE FIRST NATIONAL BANK OF SIOUX FALLS, DAKOTA, and J. Leslie Thompson, as Receiver of the First National Bank of Sioux Falls, Dakota, Defendant- and Appellant-.

Filed September 27, 1888.

*Journal Entries.*

In Supreme Court, October Term, A. D. 1888.

Tuesday, October 2, 1888, being the first day of the term.

* * * * * * *

On call of calendar.

* * * * * * *

In—

THE SIOUX FALLS NATIONAL BANK, Plaintiff & Respondent,
*vs.*
THE FIRST NATIONAL BANK OF SIOUX FALLS, DAKOTA, and J. Leslie Thompson, as Receiver of the First National Bank of Sioux Falls, Dakota, Defendant- and Appellant-.

Counsel answers for argument.

* * * * * * *

Friday, October 5, 1888, being the fourth day of the term.

* * * * * * *

291 In—

THE SIOUX FALLS NATIONAL BANK, Plaintiff and Respondent,
*vs.*
THE FIRST NATIONAL BANK OF SIOUX FALLS, DAKOTA, and J. Leslie Thompson, as Receiver of the First National Bank of Sioux Falls, Dakota, Defendant- & Appellant-.

Cause argued.

Saturday, October 13, 1888, being the eleventh day of the term.

* * * * * * *

In—

THE SIOUX FALLS NATIONAL BANK, Plaintiff and Respondent,
*vs.*
THE FIRST NATIONAL BANK OF SIOUX FALLS, DAKOTA, and J. Leslie Thompson, as Receiver of the First National Bank of Sioux Falls, Dakota, Defendant- and Appellant-.

Judgment of the district court within and for said Moody county appealed from herein be, and the same is hereby, in all things affirmed.

292 In Supreme Court, Territory of Dakota, *ss*:

I, James H. C. Young, clerk of the supreme court within and for the Territory of Dakota, do hereby certify that the above and foregoing is a full, true, correct, and complete transcript and copy of all the papers filed in the supreme court of the Territory of Dakota in the above-entitled action, wherein The Sioux Falls National Bank is plaintiff and respondent *versus* The First National Bank of Sioux Falls, Dakota, and J. Leslie Thompson, as receiver of the First National Bank of Sioux Falls, Dakota, defendants and appellants, together with copies of the journal entries of the supreme court of Dakota Territory so far as relates to said case; also that the citation and writ of error herewith is the original citation and writ of error issued by said supreme court of the Territory of Dakota as the same now remains on record in said court.

Seal Supreme Court of Dakota Territory.

In witness whereof I have hereunto set my hand and affixed the seal of the said court this 20th day of September, A. D. 1889.

JAMES H. C. YOUNG, *Clerk.*

(Original citation and original writ of error, also copies of same, herewith.)

Endorsed on cover: Case No. 13,915. Dakota Territory supreme court. No. 284. J. Leslie Thompson, as receiver of the First National Bank of Sioux Falls, Dakota, and The First National Bank of Sioux Falls, Dakota, plaintiffs in error, *vs.* The Sioux Falls National Bank of Sioux Falls, Dakota. Filed November 9, 1889.

150 U.S. 231

150-231

Office Supreme Court U. S.
FILED.
FEB 28 1893
JAMES H. McKENNEY,
CLERK.

IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1892.

Case No. 13,915. Term No. 284.

J. LESLIE THOMPSON, as Receiver of the First National Bank of Sioux Falls, Dakota, and the FIRST NATIONAL BANK OF SIOUX FALLS, DAKOTA, Plaintiffs in Error,

*vs.*

THE SIOUX FALLS NATIONAL BANK, of Sioux Falls, Dakota, Defendant in Error.

In Error to the Supreme Court of the Territory of Dakota.

## BRIEF FOR RECEIVER AS PLAINTIFF IN ERROR.

T. B. McMARTIN,
Attorney for Plaintiff in Error,
J. Leslie Thompson, Receiver
of First National Bank.

BROWN & SAENGER, PRINTERS, SIOUX FALLS, S. DAK.

IN THE

# Supreme Court of the United States.

October Term, 1892. Case No. 13,915. Term No. 284.

J. LESLIE THOMPSON, as Receiver of the First National Bank of Sioux Falls, Dakota, and the FIRST NATIONAL BANK OF SIOUX FALLS, DAKOTA, Plaintiffs in Error,

*vs.*

THE SIOUX FALLS NATIONAL BANK, of Sioux Falls, Dakota, Defendant in Error.

*In Error to the Supreme Court of the Territory of Dakota.*

## Brief for Receiver as Plaintiff in Error.

### Facts of the Record.

The case is error to the Supreme Court of the Territory of Dakota.

The judgment below was an affirmance of a judgment rendered by the then District Court.

The action was brought by the Sioux Falls National Bank against the First National Bank to recover the sum of $16,571.61, and interest, being the amount of a "Cashier's Check," issued by an officer of the First National Bank.

The judgment was rendered by the District Court June 23d, 1887, for $18,417.24 (R. 47). The trial was before Hon. James Spencer, judge, and a jury. The Court, on motion of the plaintiff below, and upon and after the delivery of all evidence of either party, directed the jury to return a verdict for plaintiff for the full amount of its demand, (R. p. 107); the court thus taking the case from the jury.

The evidence is embodied in the Bill of Exceptions (R. 48 to 106).

The action below was brought on January 14th, 1886, (R. p. 33) against the then sole defendant, the First National Bank, and an attachment issued March 1st, 1886, R., p. 16-19) and levied upon the monies, notes, drafts, safe properties, and assets of the bank, in the aggregate estimated value of $143,506.22 (R., p. 20 26.) The sheriff, under the writ of attachment, held the property so levied upon from the day of the issuance of the writ, March 1st, 1886, until March 5th, 1886, on which day he returned all except assets of the bank, of the estimated value of $27,541.21 (R., p. 19-25-26). The issuance of this attachment occasioned the failure of the bank, and the comptroller of the currency appointed this plaintiff in error Receiver of the said First National Bank on March 11th, 1886, (R., p. 45). That thereupon this Receiver took possession of the books, records and remaining assets of the said bank, and ever since has been discharging his duties of the office. On March 31st, 1886, the defendant in error delivered the balance of the assets levied upon, viz: $27,541.21, to the Receiver (R., p. 18). Acting under advice from the comptroller, on December 28th, 1886, the Receiver, by motion and petition, applied to the Court for an order substituting him as party defendant in the place and stead of the defendant bank, that the Receiver, under order of

said comptroller, might have the charge and management of said defense as an asset of said insolvent bank (R., p. 44-47.) The Court thereupon made the Receiver *an additional party*. The Receiver excepted to the order, claiming the right absolute of substitution. (R., p. 47).

The Receiver under said order, then filed answer, (R. 39) being thereby compelled to adopt theories and allegations of the defendant bank.

The case was commenced in Minnenaha county, but the venue was changed by order of Court to Moody county.

The complaint of plaintiff alleges the incorporation of both plaintiff and defendant banks under Act of Congress relative to National Banks—the issuance and delivery of check setting out copy as follows :

"SIOUX FALLS, DAK., Jan. 12, 1886.

"No. 91. The First National Bank of Sioux Falls "pay to the order of C. K. Howard, County Treasurer, "sixteen thousand five hundred seventy-one and 61-100 "dollars, $16,571.61.

W. F. FARBECK, Cashier."

The words "Cashier's Check" printed across the face of the check. That the check was endorsed "C. K. Howard, County Treasurer," and delivered the same day, and that on January 13, it came into the possession of plaintiff's bank in the usual course of business for value. That it was presented and payment demanded on January 13, 1886, and refused (R. 30-31).

The answer of the bank, served March 10, 1886, is found on page 33, and the separate answer of the Receiver was served April 11, 1887, and is found on page 39 of Record. The plaintiff thereupon served reply in effect a general denial, (R. 38).

There was no objection made by either party to the

sufficiency of the pleadings on the trial except the defendants insisted that if the doctrine of estoppel should in any view that might be taken be relied upon it could not be invoked, as it had not been plead (R. 51.)

The evidence to the jury was the following: The plaintiff after introducing the check and endorsement as shown in complaint rested (R. 48).

The defendants then introduced evidence proving that C. K. Howard, the county treasurer, was confessedly a defaulter and about having his semi-annual settlement with the county. He had talked with the president and cashier of the defendant bank with regard to funds to make the settlement. He had checked over his accounts with the commisioners. He went to the First National Bank for $16,571.61, the amount needed. He had about $12,000 on hand in a box in the treasurer's vault, which with the $16,571.61 would balance his account. He had nothing deposited to his credit at the bank. He asked the cashier, Furbeck, for a certified check but was refused. The cashier gave him the check in suit, with the conditions that he would retain possession of it, deliver it to no one and return it in 20 minutes and deposit the funds in his private vault. This was after the closing of the bank for the day's business. Howard gave nothing for this check, nor was it charged to any one on the books of the bank. (R. 69.) He did not return the check nor make any deposit whatever in the bank. The capital stock of the defendant bank was $50,000. Howard took the check to the board of commissioners then in session. He endorsed it at the request of the board. Howard's bondsmen, through D. R. Bailey, their attorney, had petitioned the board to be released from the bond before any money was brought before the commissioners by Howard. After the check was brought in Bailey drew and presented to the board a resolution (R.

p. 66, Wright) which was adopted by the board the following morning, in effect "turning the funds presented "by the treasurer in his settlement over to his bondsmen, "putting the bondsmen in charge of the office of county "treasurer until the additional bond was furnished, said "funds to be deposited (?) and remain the funds of Min-"nehaha county." This resolution was passed *January 13, 1886.* (This suit was commenced *January 14, 1886.*) No other or further resolution was passed until January 18th, when Howard, the treasurer, accounts was approved, and that afternoon Howard resigned his office, and on the same day C. L. Norton, cashier of plaintiff bank, was appointed his successor. On *January 19, 1886*, the *check of the bondsmen* certified to by the plaintiff bank was received by the commissioners in discharge of Howard's bondsmen. (R., p. 79 and 80.) The bondsmen took the funds including the check, to the Dakota National Bank and offered them for deposit. The bondsmen knew Howard was behind in his accounts, and had been a defaulter for a number of years prior to this settlement. Hollister, one of the bondsmen, had, when cashier of the defendant bank at many of the settlements of January and July of each year, taken money and checks to the commissioners when Howard was a defaulter. That he expected the officers of the defendant bank would follow that custom and present a check to the commissioners and that he and the other bondsmen would step in and ask the commissioners to turn the funds over to them. (R. 57 and 58 Hollister, 74 Corson.)

Corson, another bondsman, "knew it was going to be handled that way." (R. Corson 75). They passed the First National Bank in going to the Dakota National Bank, which was located opposite side of the street. The Dakota National refused to receive, give credit, or purchase the check without the endorsement of the bonds-

men, or indemnity from them. The check was, at the bondsmen's request, presented to the First National Bank for payment about 11 o'clock, in the forenoon of January 13, 1886, and payment refused. (R. Hollister 57-8, Corson 74). An arrangement was partially entered into for such indemnity against the check, and was finally arranged, if the plaintiff bank did not take the check without endorsement would bring the check back to the Dakota National. That D. R. Bailey, the bondsmen's attorney, and author of the resolution, was with the bondsmen from the time of receiving the funds from the county until after the three bondsmen and himself and left the Dakota National. The funds, including check, were handled in a tin box which was left in the Dakota National by the bondsmen, during the noon hour. (R. 58-64, costs). McKinney, the president of plaintiff bank, occupied same table with Brace, the president, and Carpenter, the cashier of the Dakota National Bank, at dinner at the Cataract House, the 13th of January, and McKinney inquired of Brace if he knew who was going to get the county treasurer's deposit? (R. 77, Carpenter bond 78). And of Carpenter, if he had been up to the commissioners' room, or if he had heard what they had done about settling with the county treasurer. After the dinner, and while in the hotel office, McKinney, in conversation, in hearing of Jacob Schaetzel, jr., asked, when talking about a check, "What is it; is this a straight cashier's check?" Mr. Corson said yes. McKinney then said, I would like to have it; they would either pay it or close their doors. (R. 63). Right after dinner McKinney was sitting in the directors' room of plaintiff bank, D. R. Bailey came in and told McKinney that he had been engaged in behalf of bondsmen of C. K. Howard in getting released from the bond. J. B. Young had left and they wished to be released, and that the office

had been turned over to the bondsmen with the money. McKinney inquired if the bondsmen proposed to keep the deposit with the defendant bank. Bailey said he thought not. McKinney then inquired where they proposed to keep it and said, "We would like to get the deposit; we want to get it, and I see no reason why he had not just as soon deposit with us as any of the other banks. (R. 103, McKinney). After this conversation Bailey communicated with the bondsmen regarding the deposit (R. Corson 74, Hollister 59), and together with the three bondsmen went to the Dakota National Bank. The bondsmen then took box, check and funds, went out the back door of the Dakota National Bank, down the river bank, behind the buildings and into the back door of the plaintiff bank. (R. 74). In the directors' room they met McKinney, president; Currey, assistant cashier, and Norton, cashier of plaintiff bank, and D. R. Bailey. Hollister carrying the tin box containing the funds. Bailey went in the front way and called McKinney to step into the back room. (R. —). Hollister turned the money upon a desk in the back room and said to McKinney, "I brought you the deposit," or "here it is." (R. 60, Hollister). McKinney and Hollister commenced counting the deposit of $27,236.63, and called Currey to assist them. (R. 99, McKinney). When he came to this $16,000 check, McKinney said this is a nice check; a good sized check. Hollister said I want this deposit as cash. After the money was counted Norton, the cashier, at the suggestion of Bailey, made out a deposit or pass book in the name of H. L. Hollister, C. G. Coats and W. H. Corson, the bondsmen, as bondsmen. (R. 63 Book, Hollister 60). The check was not endorsed by the bondsmen and they had no account at that bank. (R. 102). Hollister endorsed several other checks making up the deposit; (R., Hollister 59), was

not asked to endorse this one. Bailey then said to McKinney, "that is a pretty good-sized check, you better go and get your money on it." McKinney said he would collect it or see that their door did not open the next morning. (R. costs 63, Corson 74.) The deposit was made about 2 o'clock in the afternoon. A majority of the board of directors were seen concerning the taking of the check on deposit. The same afternoon McKinney presented the check for payment and payment was refused, defendant bank stating it did not represent any consideration to them and they would not pay it. (R. 70, Wills). Norton then presented it with like result. On the evening of that day Norton, plaintiff's cashier, called at the house of Wells and not finding him at home went to the house of Mr. Wilkes and there found Wells and said there would be trouble on the morrow if the check was not paid. Wilkes, Wells and Norton then went to the plaintiff bank and there met McKinney and Keith. Wilkes and Wells said to Norton and McKinney at the bank in the presence of Keith, the lawyer, that the check had been obtained from the First National Bank without consideration and had been fraudently diverted from the purpose for which it was issued and they had better charge this check back to the party depositing it. McKinney and Norton admitted they paid nothing for it, but said that was not the way of doing things and they proposed to make defendant bank pay it. Wilkes and Wells repeatedly urged them to charge it back. Mr. Norton said they couldn't do it; and if the bank did not pay it they knew a way to make it and that mighty quick too. (R. Wells 67, Wilkes 81, Peck 72). Plaintiff began this action on January 14, 1886, and paid nothing out on this check or deposit until January 19th. Currey, the assistant cashier of plaintiff on the evening of the 12th knew the check was out and had been given

to the county treasurer to make settlement, had not been returned and somebody else would probably get it away from the First National Bank. (R., Hills 56). He sought S. T. Clover, editor of a Sioux Falls paper, soliciting an article advocating the action of the plaintiff bank in taking the check, and in that conversation said they had got the check. Bailey assured them they were all right and the First National Bank would have to pay the check or they would "bust" the bank. (R. Clover 67–8). We offered to show that McKinney wanted Hollister to help defray the expenses of this suit and said, "I have helped you out and you had better help me out." (R. Hollister 60.)

The above is a brief statement of the facts in this case and upon which a verdict was directed for the plaintiff. This we confidently claim is error. What does the case disclose and wherein is the error? An officer of a national bank issues an instrument titled a cashier's check, to a county treasurer, without funds to represent it. Call the transaction a loan, it is in excess of the powers of the *bank* to loan more than one-tenth of its capital stock to any one individual, and beyond the *naked* power of that officer to make a loan at all. Call it a loan of credit it is equally beyond the powers of a national bank or its officers. Whatever transaction the check represents, it was only conditionally delivered and that condition broken. While we shall contend the instrument is not a negotiable one *under our code*, yet we shall urge, being in excess of the powers of a national bank, that defense will obtain even in the hands of an innocent purchaser; and if that position is not tenable, we confidently claim the plaintiff bank has not shown itself to occupy the position of having to its credit the first element of an innocent purchaser,—say nothing of such strength of position as would warrant a court in directing a verdict for plaintiff.

It was the county treasurer's funds received through the county commissioners and the plaintiff bank knew it. What title did the county or the bondsmen have, and where is their power to deal in commercial instruments? What did the county pay for it and wherein were they injured by the acquisition of the worthless check? The plaintiff bank paid nothing for the check until five days after this suit was brought. The above objections are sufficient to defeat the position of innocent purchaser, as its character is shown by the check itself and the character of the pretended credit, and are independent of the other essentials to an innocent holder. There is no pretense of its being acquired in the *ordinary course of business.* There is a total absence of *good faith.* It had been actually dishonored. The defendant bank had four times refused payment of the check and three times in the hands of the officers of plaintiff bank before their bringing this suit. It was further shown at the trial that before the county commissioners had turned this check and the money of the treasurer over to his bondsmen, they were notified "not to take into consideration that "check;" that the bank would "defend against it as in "the hands of Howard and refuse payment;" that "the "board was notified not to make any settlement with "Howard involving this check in suit as representing the "cash it called for." (R. 81, Wilkes.)

The foregoing is a brief statement of the evidence produced at the trial at the close of the testimony. He, plaintiff, by motion, asked the Court to direct a verdict in favor of the plaintiff, upon the grounds, to-wit:

1. The undisputed testimony shows that the check in suit was issued upon a valuable consideration, to C. K. Howard, for him to use as cash in making his semi-annual settlement with the board of county commissioners.

2. The undisputed testimony shows that the county

commissioners received said check from Howard the same as cash on his settlement, and with the check and money that Howard had on hand, all amounting to about $27,000, made full settlement as county treasurer with the county commissioners.

3. That upon the request and demand of the bondsmen of said Howard, the commissioners turned over to them all of the funds of the county received from Howard, including this check, and put the bondsmen in charge of the office of county treasurer.

4. That the bondsmen took said funds, including the check, to plaintiff's bank, and the same were received by plaintiff and deposited as so much cash to their credit.

5. That the undisputed testimony shows that the plaintiff received said funds, including the check, without any knowledge of infirmities, if there were any, attached to said funds, including the check, and without notice that there was anything claimed to be wrong about the same.

The Court saying:

"It is a fair inference from the testimony and it seems to be admitted, that Howard was short in his accounts and in his settlement with the county, perhaps in the sum of about $16,000, and on the 12th day of January the First National Bank issued this check, and if in good faith, legitimately, and the law would presume it was done legitimately, although there is some evidence that it was not, then this check was good, and there could be no defense to it. If it was issued illegitimately and for the purpose of deceiving the county commissioners, and to aid Howard in his settlement, they are not in a position to defend against it. The case, stripped of the husks that surround it, is very simple and all the material facts uncontradicted. There is no evidence, even admitting all the defendants' testimony, that the plaintiff had notice of any irregularity in the issuance of the check or that there was any defense to it in the hands of anyone until

the evening of *January 13th*. (The suit was commenced the 14th).

"If the plaintiff had the right to charge it back, he was not bound to do it, and did not do it, but elected to pursue its remedy against the defendant, as it had the right to do."

The court thereupon directed the jury to return a verdict in favor of the plaintiff for the sum of $18,247.14, to which the defendant at the proper time duly excepted. (R., p. 107).

The defendant thereupon moved for a new trial. (Which under the law and the practice of the Territory of Dakota was necessary to review any action of the Court in matters tried before a jury.) The motion for a new trial having been denied and the same being made a part of a bill of exceptions, the defendant on July 21, 1888, appealed to the Supreme Court of the Territory of Dakota, and agreeable to practice in that Court asked for review of the order making this defendant an additional party instead of substituting him as sole defendant; also to review the order denying motion for new trial. (R. 5.)

Bill of Exceptions approved and certified by James Spencer, April 13, 1888. (R. 115.)

The Supreme Court of Dakota Territory in affirming case held as follows:

II. "The Court erred in denying the motion of the "receiver to be substituted as sole defendant in the action."

II. "The cashier's check sued upon in this action "upon *its delivery to Howard* as treasurer, *immediately* "*became the property of the county*, and the defendant "bank could not be heard to assert any fact which might "be a defense between itself and Howard in his individual "capacity; and the plaintiff bank having by the transfer "succeeded to all the *rights of the county*, there was no "errors in directing the verdict of the jury." (R. 159).

There was no further opinion ever written in the case.

It will thus be seen that the trial Court took from the jury the determination upon the evidence delivered to it of the many issues involved in the course; and the writ of error brings to this Court the question, whether, in view of the pleadings and evidence set forth in the Bill of Exceptions there was error in the action of the Court in thus withdrawing the case from the jury and of the Supreme Court in affirming such action.

## Assignment of Errors.

I. The Court erred in holding that the evidence set forth in the Bill of Exceptions, did not, as a matter of law, show that the plaintiff *had no title or right to check in question*, and if they had title only such as was burdened with same equities and defenses as the defendant bank had in the hands of Howard.

II. The Court erred in holding that there was no evidence entitled to be submitted to the jury as set forth in the bill tending to show notice of irregularities and defenses in the issuance of the check.

III. The Court erred in holding that while the plaintiff had the right to "charge back" the check in suit it was not bound to do it, we claiming it was the absolute duty of plaintiff when dishonored to return check to the depositors or take it subject to all defenses.

VI. The Court erred in withdrawing from the jury, as set forth in the Bill of Exceptions, and in depriving defendant of the right to have the finding of the jury upon the following questions:

*1st.* Of purchaser in "good faith."

*2d.* Of purchaser for value.

*3d.* Of purchaser in ordinary course of business, check shows on face to be for trust funds and was so known by plaintiff bank.

*4th.* Of notice to plaintiff before its acquisition of the defenses of defendant bank.

*5th.* Of notice to plaintiff before it took check and of its actual dishonor.

*6th.* Of the question of "innocent purchaser" or indorsee in good faith.

For further particulars, if necessary, of this assignment. See exception on p. 151 and 152 of Record.

V. The Court likewise erred in the holding that the check ever became of valid obligation of the defendant bank. There was no money in bank to represent check—its issuance was an act *ultra vires* of the bank and of its officers. Bank could not loan its credit. Being a bank whose capital stock was $50,000, could not loan more than 10 per cent of its capital stock. For more particular specification of error, if necessary, see exception, p. 150, Record.

VI. The Court erred in overruling this Receiver's motion to be substituted as party defendant in the action.

VII. The Court erred in refusing defendants' motion to strike out the testimony of President McKinney that he treated cashiers' checks as cash.

VIII. The Court erred in directing a verdict for plaintiff.

IX. The Court erred in rendering judgment.

X. The Court erred in admitting in evidence the statement "Exhibit B," as follows:

FIRST NATIONAL BANK, SIOUX FALLS, DAKOTA.

"The books of the bank show a credit in favor of the "county of $15,625.01. If you wish, you have the priv-"ilege of examining the books.

R. J. WELLS, President.
W. F. FARBECK, Cashier."

For the reasons see p. 2.

1. That it is wholly disconnected with the cause of action in suit.

2. It is a statement which, if made at all, was made prior to the issuance of this check without any authority

of the Bank, and beyond the authority of the Bank, and and is not a part of the *res gestae* of this action, and has not been pleaded as being founded upon the check set forth in the complaint.

3. Being a straight action for the money represented by the check, the testimony, if available at all, is by way of estoppel on the part of the plaintiff, and the estoppel has not been pleaded, and these supposed representations contained in the statement were never relied upon by the commissioners.

4. That the issuance of this paper was *ultra vires* of the defendant bank.

5. That the commissioners, to whom this letter appears to have been directed, are not parties by endorsement or otherwise to this check.

6. That the commissioners were placed in a legal sense where they had no authority or right to rely, and did not rely upon the authority of the letter.

7. That their dealings with the County Treasurer in the settlement of his account only pertained to their right to count the moneys exibited before them, and other matters pertinent, to count and consider, and they could not consider anything as money in the shape of letters, accounts, or checks.

XI. And for other errors appearing in the record.

## Brief for Plaintiff in Error.

### The Right to Direct a Verdict.

The test as to when the Court may withdraw a case from a jury is stated by this Court in effect that it is the duty of the Court to give to the party the benefit of every inference that could be fairly drawn from the evidence; and it is only when the party is so given the benefit of every such inference that could be fairly drawn

from the evidence that the Court is justified in withdrawing the case from the jury, unless the testimony be of such a conclusive character as to compel the court in the exercise of a sound, judicial discretion, to set aside a verdict rendered in opposition to it.

Insurance Co. *v.* Doster, 106 U. S., 32.
Wolverton *v.* Nichols, 119 U. S., 490.
Marshall *v.* Hubbard, 117 U. S., 418.
Improvement Co. *v.* Mason, 14 Wall, 448.
Goodlett *v.* Howard, 122 U. S., 411.
Randall *v.* Railroad, 109 U. S., 478.
Pleasants *v.* Faut, 22 Wall, 120.
22 Wall, 143.
107 U. S., 162.
109 U. S., 483.
113 U. S., 241.
113 U. S., 320.

This rule is so well settled that it is improper to further multiply statements of it.

We are, therefore, remitted to the question as to whether the case as shown in the record would justify the setting aside of the verdict if it should have been left to the jury and the jury had found for the defendant.

What does the record disclose and wherein the error?

An officer of a National Bank, whose capital stock is $50,000, issues an instrument titled a cashier's check, payable to a county treasurer for the sum of $16,571.61, without any funds of the county treasury in the bank to represent it, and without any security to the bank for it. Call the transaction a loan? It is in excess of the powers of the *National Bank* to loan more than *one-tenth* of its capital stock to any one individual, no matter what the security;

§29 National Bank Act.
Morse on Banks, 2d Ed., p. 561.
Union Gold Mining Co. *v.* National Bank, 96 U. S., 640.

Shoemaker *v.* National Mechanics Bank, 2 Abb., 416.
Stewart *v.* National Bank of Maryland, 2 Abb., 424.
O'Hare *v.* Second National Bank, 77 Penn. St., 96.
Allen *v.* First National Bank, 22 Ohio St., 97.
Elder *v.* First National Bank, 12 Kansas, 238.

and beyond the *naked* power of the cashier to make a loan at all, that being the function of the board of directors.

Morse on Banks and Banking.

Call the transaction a *loan of credit* (R. 111), it is equally beyond the powers of a national bank or its officers. Whatever transaction the check represents, it was only conditionally and that condition broken. While we might contend that the instrument is not a negotiable one *under Dakota code*, (not otherwise). We confidently claim the plaintiff bank has not shown itself to occupy the position of having to its credit the *first element of an innocent purchaser*,—say nothing of such strength of position as would warrant a court in directing a verdict for plaintiff. It was the county treasurer's funds received through *the county commissioners* and the *plaintiff bank knew it*, and was a fraud on its face. What title did the county or bondsmen have, and where is the power of counties to deal in commercial instruments? What did the county pay for it and wherein were they injured by the acquisition of the worthless check. The plaintiff bank paid nothing for the check until five days after this suit was brought. The above objections are sufficient to defeat the position of innocent purchaser, as its character is shown by the check itself and the character of the pretended credit, and are independent of the other essentials to an innocent holder. There is no pretense of its being acquired in the *ordinary course of business*. There is a total absence of *good faith*. It had been *actually dis-*

*honored.* The defendant bank had four times refused payment of the check *and three times in the hands of the officers of plaintiff bank* before their *bringing this suit.*

What is a cashier's check? While the court permitted witness McKinney, over our objection, to say he treated cashier's checks as cash, (Assignment of Errors No. 7,) section 5183 of the Revised Statutes of the United States says: "No national banking association shall issue post notes or any other notes to circulate as money than such as are authorized by the provisions of this title."

Ball National Banks, page 184. Brown's N. B. Cases, 487.
Act of February 18, 1875.

In Cannonsburg Iron Company *v.* Union National Bank, (October, 1886) 4 Central, Rep 261, the Court, in treating of *cashier's checks* said: "The check was taken for a pre-existing debt. The case stated does not aver any agreement that it was to be accepted as an absolute payment. The burden was on the maker to overthrow the presumption that the check was taken as conditional payment. *It was of no higher character than a note and it certainly was not money.*"

Morse on Banking, 204.
Penn. Bank *v.* Frankish, 91 Penn. St., 343.
Briggs *v.* Holmes, 10 Cent. Rep., 629. (January, 1888).

Not being cash is it a negotiable instrument? Our code says:

"There are six classes of negotiable instruments, namely: "Bills of exchange," "promissory notes," "bank notes," "checks," "bonds," "certificates of deposit." §1829, §4464 Comp. Laws Dakota."

If then it is a negotiable instrument it must be either a bill of exchange or a check, and if that is true, and

there can be no doubt of it, we will show independent of all other considerations, this suit cannot be maintained. If it is a bill of exchange, the defendant would be entitled to the usual days of grace, and this action brought within three days of the issuance, and within two days after the presentment of the bill, would be premature. We do not think it is a bill of exchange, as the drawer and drawee are the same person. It then to be negotiable must be a check and no action can be maintained by the holder of a check against the drawee without acceptance.

Bull *v.* Bank of Kisson, 123 U. S., p, 110.
Bank *v.* Millard, 10 Wall, 343.
First National *v.* Whitman, 4 Otto, 343.

In the case last cited the Court said: "We think it is "clear, both upon principle and authority, that the payee "of a check, unaccepted, cannot maintain an action upon "it against the bank on which it is drawn. The careful "and well reasoned opinion of Mr. Justice Davis, in de- "livering the judgment of this court, in Bank *v.* Millard, "leaves little to add upon this subject, by way of illustra- "tion or authority." (4 Otto, 343.)

In the case of Bull *v.* Bank of Kasson, 123 U. S., 110, which was a suit against the maker of a check, identical in its wording to the one in suit, except that it was drawn on a *third bank*, in affirming former decisions say, "with- "out acceptance no action can be maintained by the "holder against the drawee." In discussing the difference between check and bill of exchange say, "The "chief points of difference are that a check is always "drawn on a bank or banker. No days of grace allowed. "It is not due until payment is demanded and the statute "of limitations runs only from that time." If it was not for the third party the above case would be conclusive of the case at bar, and must be regardless of that distinction if it is a negotiable instrument under our code.

The instrument is not a certified check, as that form of a check only obtains when a *creditor* and depositor of the bank issues his check and *its* genuineness is certified to by the proper officer of the bank. If it was a certified check, the payee would be the party drawing. Certifying a check is equivalent to acceptance.

Merchants Bank *v.* State Bank, 10 Wall, 604, p. 648.
Farmers and Merchants Bank *v.* Butchers' and Drovers' Bank, 14 N. Y., 624.
Cook *v.* State Bank, 52 N. Y., 96.
Louisiana Ins. Co. *v.* State Bank, 1 McElvin, p. 180.
Banks and Depositors, Bolles, §224.

This instrument then is an ordinary contract or obligation of the bank, liable to be defeated by the many defenses open to such instruments. In the first place the check was never delivered, but was given to him upon condition he should not let it go out of his hands and would return it in twenty minutes. (R. 50–69). It needs no authorities to sustain that position as a defense against any one except perhaps an innocent purchaser.

But the evidence in part seems to show a loan of credit of the bank to assist Howard temporarily in making his settlement R. 68–71), that would likewise be a defense in the hands of the bank as against Howard independent of the above defenses; as a national bank itself has *no power to loan its credit.*

Johnson *v.* Charlottesville National Bank, 3 Hughes, 657.
Section 5136, Revised Statutes U. S.
Ball National Banks, pp. 50 to 54.
Seligman *v.* Charlottesville National Bank, 3 Hughes, 647.
Brown's National Bank Cas., pp. 203 and 195.
Daniel Neg. Ins., § 392,
West St. Louis *v.* Bank of Shawnee, 95 U. S., 558.

Lafayette Bank *v.* State bank, 4 McLeon, 208.
Morse on Banks, 164.
Farmers Bank *v.* Troy Bank, 1 Doug. (Mich.) 457.

In the case of Johnson *v.* Charlottesville National Bank, Hughes 657, the Court says:

"And the Court finds as a matter of law, that upon these facts the issuing of the bills of exchange in question was not a discount because the Bank of Charlottesville had no funds with which to discount paper presented for payment; but that it was merely *a loan of the bank's credit* to Flanagan & Son. * * It makes no difference whether the same were given to Flanagan & Son for a note deposited by them with the bank at the time secured by collateral security or not; the said drafts were but the accommodation paper of the bank and as such were void in the hands of plaintiff, who took them with such kowledge of their character." See

Farmers and Mechanics Bank *v.* Troy Bank, 1 Doug. Mich., 456.
Claflin *v.* Farmers and Citizens Bank, 25 N. Y., 293.
Bank of Genesee *v.* Patchen, 13 N. Y., 309.
Bali National Banks, 100 and 102.

We have been thus brief in our statement and citation of authorities showing the abundant defenses in the hands of the defendant bank, for the reason that the Court will have observed:

That the trial court, the Supreme Court of Dakota Territory, and counsel have never contended but that the defenses of the defendant bank were numerous, proven, and practically admitted.

## Power, Authority and Effect of the Action of the County Commissioners.

In discussing the power, authority and effect of the action of the Board of County Commissioners we will show:

*First*—What they did, their mode of procedure, and their knowledge of the defendant bank's defenses.

*Second*—Their power and authority in the premises under the Laws of Dakota Territory.

We claim, as we have plead, that the Commissioners were a party to a conspiracy to defraud the bank. That they had full notice, before taking any action regarding this check, of the defenses of the bank, and that what they did do was unauthorized by law, and void, and that all of which was known to plaintiff bank, and that it was flagrant error for the Court to diregard the testimony and law in this regard in its order directing a verdict.

The following evidence under proper directions of the Court should have been submitted to the jury: Howard, the treasurer, testified. (R., 82 to 91):

At my settlement with the commissioners, in January, 1886, I appeared before the board with my books and vouchers, and we settled up. There was a balance due the county, up to the first of January, of $27,000. I also had in my hands several thousand dollars, which I afterwards turned in. I had cash on hand for the amount due the county except this check, the amount less some fifteen or sixteen thousand dollars. I had this money before the board at the time in question. I had the money in connection with the bank book. The bank book was written up in the bank by some of the officers of the bank and handed to me by some of the officers; I think Mr. Furbeck or some of the clerks, I haven't that book. I showed the bank book to the county commissioners. They said no doubt that was all proper, but they would like to have some little further assurance that I had the stuff—the money. I then went down to the bank and told Mr. Wells and Mr. Furbeck that my settlement was all satisfactory, and my books were all checked up, that the commissioners wanted some more conclusive evidence

that I had that much money. If my recollection serves me, Mr. Wells gave me a letter to the effect that the books of the bank showed that I had as county treasurer a credit to Minnehaha county of so much money, fifteen or sixteen thousand dollars. I showed the statement to the commissioners. My recollection is that the commissioners said that was getting a little nearer bedrock, but they would like a certified check. I then went down and got check in suit. I told them that the commissioners requested of me a certified check. I turned the check over to the commissioners in settlement, enough to make, with the currency, $27,000, as near as I can remember. They were in session at that time. It was their semi-annual meeting. I remember when I went there on this last occasion when the check was delivered to me, I wanted to get the money instead of the check. I remember saying to them, "Of course if I take the "money and that was counted, that will be the end of it." I remember saying that the commissioners wanted a certified check. Mr. Furbeck said, "We do not issue cer- "tified checks, but I will give you a cashier's check." That is as near as I can remember. My recollection is that this transaction was quite late in the day. I had been busy all day with my settlement, but I cannot state positively as to the time. Mr. Furbeck handed me the check. I went directly from Mr. Furbeck to the board of commissioners. I was a little on the anxious seat myself then and in a hurry. When Mr. Furbeck gave me the check, I told him, as near as I can remember, that if they would allow me to straighten up everything I would deposit the check and currency in the morning. I refer to the money that I had on hand, which I had retained in my private box in the vault of the treasurer's office until the settlement. I told Mr. Furbeck that no doubt that would complete my settlement and as soon as I had

perfected the settlement, I would return the check and also place to the credit of the county what money I had in my possession—some twelve or fourteen thousand dollars. It was the understanding that this check was not given to me to be treated as a valid and binding obligation against the defendant in this suit, but was simply loaned to me as a credit of the bank. I remember that I assured Mr. Furbeck when I took the check that I would return the check within twenty minutes. That I would be back in the evening, it would be a very temporary transaction. I did not give my check upon the bank for the amount of this cashier's check. I went from the bank to the commissioners with the check. The entire board was there at the time in session. D. R. Bailey, lawyer, was there, also, H. L. Hollister and C. G. Coats, bondsmen. They appeared there frequently after my appearance before the board. Mr. Hollister, Mr. Coats and Mr. Bailey were there several times previous to the time when the check was delivered during that day. It was a public meeting, an open session of the board—parties out and in frequently. I had trouble enough of my own at that time. I saw these men there the next morning. Mr. Wright and N. E. Phillips were present when I delivered the check to the commissioners. I handed the check to the chairman of the board. I made the endorsement on the check that evening. It was not endorsed until after I handed it to the chairman, and the board had examined it. I did not take the check back to Mr. Furbeck, as was agreed upon. The reason was, the other fellows were a little stouter than I, and took it away from me. By other fellows, I mean my bondsmen and the commissioners. My bondsmen appeared before the board by their attorney, D. R. Bailey, and made some kind of demand, I don't remember what, claiming a settlement had been per-

fected, the funds of the county had been turned over as per our settlement, and they demanded a release from any further action on my bond; and upon this demand, this statement being made by my bondsmen, through their attorney, the board took possession of the stuff and deferred action until next morning. This occurred the evening I brought the check to the commissioners. I cannot positively state whether the check had been endorsed or not when that demand was made by my bondsmen. The commissioners took possession of my funds, papers and effects pertaining to my settlement, which were then presented. They did not give the check and money back to me. I have never had it since. They did not take possession of it with my consent. The check was endorsed that evening. Either the next day or the day following, I tendered my resignation as county treasurer. I said to them, of course, if they proposed to run the thing, why, I did not know as they needed any fifth wheel to the wagon.

The evidence of Howard is uncontradicted.

W. A. Wilkes (R. 80 to 82):

I reside in Sioux Falls and am a lawyer. Have lived in Sioux Falls nearly nine years. Am acquainted with Messrs. McKinney, Norton, Wells, Furbeck, Peck, C. K. Howard, E. G. Wright, and N. E. Phillips, and was acquainted with them in January, 1886. I knew of the proceeding in regard to the settlement of C. K. Howard, county treasurer, and the board of county commissioners of Minnehaha county in January, 1886. The first occasion that I was present in the room where the commissioners met during that settlement, was on the evening of the 12th day of January, the evening that the check was given. Mr. Phillips and Mr. Wright and some of the commissioners were there, but who I will not attempt to say. The board was not in session. I spoke

to Mr. Wright and also to Mr. Phillips. It was very late in the day, almost dark. I have seen the check upon which this action is brought. I think I first called Mr. Wright to me or walked toward him. He was off at one side of the room, and inquired of him concerning the proceedings of the board. I stated to him that I understood that there was a check that was before the board involving the matter of Howard's settlement, and I wanted to notify them not to take into consideration that check as involving so much money; that the bank would defend against it as in the hands of Howard and refuse payment; substantially that is what I said to him and substantially the same to Mr. Phillips, the clerk, although not quite so fully in the talk I had with him as with Mr. Wright. I said nothing else either to Mr. Wright or Mr. Phillips at that time. I went there at the request of Mr. Wells, president of the First National Bank. I was there the next day when the board was in session and talked with the board there concerning this matter. I think it was in the afternoon of the day following, the 13th.

A. Well, without being able to state exactly my words, I notified the board not to make any settlement with Mr. Howard, involving this check in suit as representing the cash that it called for, and that was what I was there for. I had a conversation with Mr. McKinney and Mr. Norton, at their bank, concerning this check, in the evening, on the 13th day of January, the day before the commencement of this action. I think there were present Mr. Norton, Mr. McKinney, Mr. Keith, Mr. Wells, and Mr. Furbeck, a part of the time, and myself, and later in the evening, Mr. Peck and myself alone together, when the others were gone, with Mr. McKinney; possibly Mr. Norton was there at the time. I went there in company with Mr. Norton and Wells. I said to Mr. McKinney, substantially, what we wanted them to do;

what we would like them to do, was to charge this check back to the depositors from whom they got it, and not to get into any lawsuit, which would be injurious to both of the banks and to the community, but to charge the check back, I used the expression over and over again, "you have not paid out anything on it; you have not suffered anything on it; charge it back." They declined to do so, and McKinney replied at one time during the conversation, substantially, like this: "The First National Bank has been doing that thing off and on, time and again, for years, and we don't propose to charge it back," and refuse to do so. Later in the evening, after going to the First National Bank, Mr. Peck and I went down there alone. At that time I renewed the conversation with Mr. McKinney upon the same subject, and endeavored to have them charge the check back, which they refused to do.

*Witness:* They brought suit the next day.

E. G. Wright (R. 65 to 67):

I reside in Sioux Falls, D. T. I am an attorney at law and real estate broker. In January, 1886, I was district attorney of Minnehaha county. Was present in the court house on the 12th day of January, at a settlement between the county commissioners and C. K. Howard. (Check shown witness). I have seen this check before. I first saw it about 4 o'clock on the 12th day of January, 1886. It was in the hands of Mr. Howard. He laid it down on the table that was being occupied by the county commissioners. I did not see the check endorsed. It was not endorsed when it was brought there. I didn't see it after it was endorsed that day. Mr. D. R. Bailey was present in the forenoon and afternoon and at the time this check was brought up by Mr. Howard. He was seated near the members of the county commissioners and seemed to be acting in behalf of the bondsmen

and of the county treasurer, C. K. Howard. I do not know that he did anything pertaining to the check. He presented a petition to the board of commissioners at that session and asked that the bondsmen—I think this was on the 12th. My impression is that the first petition was presented before any money had been brought in there—before the check came up. After the check came that day, I think he drew up a resolution and handed it to a member of the county commissioners.

(Paper shown witness).

Q. Look at this, Mr. Wright; it appears to be a copy of the proceedings of the board of county commissioners of the 13th of January, 1886. I call your attention to the second resolution appearing under these proceeedings and will ask you whether or not that is the resolution Mr. Bailey presented?

A. This second resolution is the one that was written by Mr. Bailey and offered to the board by a member present.

*By the Court:* When was this resolution first presented by Mr. Bailey to the board?

A. My impression is, it was presented on the evening of the 12th. I was at that time acquainted with Mr. Wilkes, one of the defendants' attorneys. I saw Mr. Wilkes in the commissioners' rooms, I should say between 5 and 6 o'clock of the evening of the 12th of January, 1886. When I had the conversation the board were in the room at the time. I had no conversation with him in the presence of the board, that is, before the board. I think the board had adjourned about five minutes before he came into the room. My recollection is that quite a number of the commissioners, a majority of them, were in the room. I had a conversation with him. Mr. Phillips, register of deeds, the county clerk, and clerk of the board of commissioners were present during

a part of this conversation. My recollection is that I was sitting at the side of the table of the county commissioners. Mr. Wilkes came in and called me out to one side of the room. I went back over to the window and he wanted to know what had been done pertaining to the county settlement. He wanted to know if they had accepted of Howard's settlement; my recollection is that I remarked to him that I was not keeping the records of the county commissioners and that he would have to see Mr. Phillips, and he and I then went together and met Mr. Phillips and he called Mr. Phillips out and there was some conversation then between Mr. Wilkes and Mr. Phillips and myself, but I cannot relate the exact conversation.

John McKee (R. 85 to 98):

I am acquainted with W. A. Wilkes. He did not appear before the board *on the 12th of January*, the date at which this check was presented by Mr. Howard, that I saw. The board did not have any communication with him at all on that day in regard to this check, or otherwise. Mr. Wilkes never, at any time, came before us as a board of commissioners, and notified us that there was anything wrong about this check.

## Cross-Examination.

*By Mr. Wilkes:*

Q. About this matter of coming before the board; don't you remember, Mr. McKee, on the 13th of January, the day following the evening when the check was brought to you, of me being before the board when the whole board were there at the table, and told you not to take into consideration in anything you might do, this check as representing the money?

A. No, sir; you never said a word about the check, as I remember.

Q. Did n't I state my reasons for coming there?

A. As near as I could gather from the conversation, you said the board had no right to turn the money over to the bondsmen, but so far as the check was concerned, I do n't remember anything said about the check. The check was n't mentioned, it was simply the question that we had no right to turn it over.

Q. Did you, as county commissioner, take advice of Mr. Keith in regard to this matter?

A. Well, yes ; I took advice of Mr. Keith and some other lawyer besides.

A. I do not think I asked Mr. Keith's advice in regard to this check; we examined this check when Mr. Howard brought it before us on the afternoon of *the 12th*. I do not know as we did anything more concerning it. I do not know what was done with the check that afternoon. I could not state positively whether it was endorsed that night or the next morning. *We did not do anything as a board concerning the check that evening. My remembrance is that after Mr. Howard brought in the check we adjourned right away until the next morning*. Mr. Howard took the money and currency that he had in a tin box that evening. I do not know whether he took the check or not; I wont be positive. Mr. Bailey was there that evening. The bondsmen put in an application to be released from the bond. I would not be positive whether that evening or the next morning; I cannot remember whether Mr. Bailey presented an application to be released from the bond that evening or not. Mr. Howard was before us on the next morning, the 13th. I believe the bondsmen of Mr. Howard were there also. I think Mr. Hollister and Mr. Bailey were there. If I remember right, this money was turned over to the bondsmen that morning. I think Mr. Hollister took possession of it. It was right there on the table.

Q. Who turned it over to them; by whose authority did they take it?

A. Well, Howard had possession of it until they got possession of it.

Mr. Howard turned it over to their possession by order of the commissioners. The box of money and the check were all there together on the table. Mr. Howard had control and custody of them until they were turned over to the bondsmen. I do not remember of meeting Mr. Wells on the morning of the 13th of January, and of his warning me not to take this check in suit, because the bank would not pay it, and that Mr. Howard had diverted it from the purpose for which it was issued. (Defendants' counsel reads to witness resolution passed by the board of commissioners, January 13.)

*Witness:* I think that resolution is a correct statement of the facts concerning the matter.

Q. At the time Mr. Howard presented this check and the money on the evening of the 12th, Mr. Howard stood fair before you, the board of county commissioners, you had no objection against him as to his being behind with the county funds or otherwise?

A. That is, as far as Howard was concerned, we deemed his bondsmen insufficient.

Q, Had you known as a matter of common repute, prior to this time, that Mr. Howard was behind in his account with the county?

A. *I had heard it before election time, that he was behind, but at that time the money was there before us.*

Witness John Thompson (R. 91 to 94).

Saw Mr. Wilkes in commissioners' room late in the afternoon of the 12th or 13th of January. He didn't make any communication to the board with reference to this check *on the 12th.* He never made any statement of any kind *before that evening. At the time* we took the check

we didn't have any question anything was claimed to be wrong about it. The check was in Mr. Howard's control until turned over to the bondsmen. The funds were turned over to the bondsmen by resolution. We made a computation of the amount. After that was done, *I think Mr. Howard's bondsmen took charge of the money, drafts and check.* The funds were kept in a little tin box. I am not positive whether the bondsmen took charge of it that evening or Mr. Howard; it was in *Mr. Howard's control* until it was turned over to the bondsmen. They were *turned over to the bondsmen just during the time that Howard should get additional freehold bonds.*

Record of County Commissioners (R. 79 to 80).

**Record of the County Commissioners of Minnehaha County, Dakota.**

*January 12th, 1886.*

C. K. Howard presented his semi-annual statement, and the settlement with the county treasurer commenced, and books and vouchers examined until adjournment. The afternoon was devoted to settlement with county treasurer.

*January 13th, 1886.*

On motion of Arthur Jones, the following resolution was adopted:

WHEREAS, In the opinion of the board of county commissioners, in and for Minnehaha county, D. T., the bond heretofore given by the county treasurer, has been rendered *less strong* by the removal from the Territory, of one of the sureties (J. B. Young) upon said bond; and therefore, be it

*Resolved*, That the county treasurer of Minnehaha county be, and he is hereby required by this board to give additional freehold sureties in the penal sum of $50,000, it being the opinion of the majority of said board

of commissioners, that the existing security has become insufficient for the proper indemnity of said county.

On motion the following resolution was adopted:

*Resolved*, That the funds presented to the board of county commissioners of Minnehaha county, by the treasurer, C. K. Howard, in settlement of his accounts with the county, be and is hereby turned over to his bondsmen, and the bondsmen are put in charge of the office of county treasurer until the additional bond is furnished, *said funds to be deposited and remain the funds of Minnehaha county.*

The afternoon was devoted to county treasurer business.

JANUARY 18, 1886.

On motion the following was adopted:

*Resolved*, That the semi-annual settlement made with C. K. Howard, county treasurer of Minnehaha county, to January 1, 1886, *be and the same is hereby approved*, and the vouchers and accounts having been found correct as per statement filed January 12, 1886.

## Afternoon.

*To the Honorable Board of County Commissioners of Minnehaha County:*

GENTLEMEN: I hereby tender my resignation as treasurer of the county of Minnehaha, to take effect immediately.

C. K. HOWARD,
Treasurer of Minnehaha County, D. T.

On motion, the county treasurer, C. K. Howard, is hereby required to settle his accounts to date.

On motion the following resolution was adopted:

*Resolved*, That the resignation of C. K. Howard, county treasurer of Minnehaha county, be and the same is hereby accepted.

On motion the following resolution was adopted :

WHEREAS, The Hon. C. K. Howard has resigned the office of county treasurer of Minnehaha county, Dakota Territory, and in consequence of said resignation, said office has become vacant; now, therefore, we, the board of county commissioners for said county of Minnehaha, aforesaid, do hereby appoint C. L. Norton, (plaintiff's cashier), of Minnehaha county, Dakota Territory, to the office of county treasurer of said Minnehaha county, to fill the vacancy in said office for the unexpired term for which the Hon. C. K. Howard was elected, and until the next general election or until his successor is elected and qualified.

JANUARY 19, 1886.

On motion the following resolution was adopted:

*Resolved*, That whereas, we have this day appointed Charles L. Norton, treasurer of Minnehaha county, Dakota Territory, that we do hereby require the said Charles L. Norton to give a bond to said county in the penal sum of $100,000, with good and sufficient freehold sureties.

JANUARY 19, 1886.

On motion the following resolution was adopted:

*Resolved*, That the bondsmen of C. K. Howard be, and they are directed to turn over to the commissioners of the county of Minnehaha and Territory of Dakota, all the evidences of deposit and all funds belonging to the county of Minnehaha.

The official oath and bond of Charles L. Norton as county treasurer was presented, and on motion, the bond was accepted.

The check of the bondsmen in the sum of $27,236.63, certified to by C. E. McKinney, president of the Sioux Falls National Bank, in full discharge of said bondsmen

for the funds received of the county of Minnehaha, January 13, 1886, was accepted on the following vote:

Yeas—Bannister, Thompson and Berdahl.

Nays—Jones.

And the funds were turned over to Charles L. Norton, and the following receipt issued and signed by the said Charles L. Norton as county treasurer:

Received of the county commissioners of the county of Minnehaha and Territory of Dakota, the sum of Twenty-seven Thousand Two Hundred Thirty-six and 63-100 Dollars in currency, being the funds belonging to to the county of Minnehaha.

[Signed]

JOHN MCKEE,
Chairman.

N. E. PHILLIPS,
County Clerk.

E. M. Hills (R. 56):

Am cashier of the Citizens National Bank of Sioux Falls. I am acquainted with C. K. Howard. I know Arthur Currey, who, at that time, January, 1886, was assistant cashier of the Sioux Falls National Bank. On the evening of the *12th of January, 1886*, at a railroad meeting in the court house, in Sioux Falls, Currey and myself had a conversation concerning a certain check issued by the First National Bank. I don't know that I could say that the amount of the check was stated; it was talked that the amount was large, and I presume very likely the amount was stated, but I could not state from my recollection that it was stated. It was stated that the commissioners were having a settlement with the county treasurer, Mr. Howard. That he was settling his account with the commissioners; that he had sent his usual bank book there and the commissioners were not satisfied with it, and afterwards and finally they had sent up

the check and that it was issued with the expectation that it would come back as in former settlements; that money had been sent up in a pillow to the county treasurer's office, and they had given a check and it hadn't come back, and it was afloat and somebody else would probably get it away from the First National Bank.

C. C. Carpenter (R. 77), cashier of Dakota National Bank, Sioux Falls:

Had talk with McKinney at dinner table the 13th of January. He, McKinney, asked me if I had been up to the commissioners' room *or if I had heard what they had done about settling with the county treasurer.*

Geo. H. Brace (R. 78):

Am president of the Dakota National Bank, Sioux Falls. Am acquainted with McKinney, president of Sioux Falls National Bank. Took dinner at the Cataract House with him on January 13. McKinney and myself boarded there at the time, and were in the habit of sitting at the same table. I think Mr. McKinney asked the question if I knew who was to get the deposit, and I replied I did not. The deposit that was referred to was the county treasurer's deposit. There was not much said, but I think there was something of that kind said. I think Mr. Carpenter, Mr. McKinney and myself, were all that were sitting there at that time; probably some one else might have been there, I cannot say as to that.

A. L. Currey (R. 105 to 106), called and sworn in behalf of plaintiff and examined by Mr. Keith, testified as follows:

In January, 1886, I was assistant cashier of the Sioux Falls National Bank. I was not in the bank when the bondsmen came there with the deposit. I came in while they were there and saw Mr. McKinney engaged in overlooking the funds. He asked me to help him count it and I did so. I never saw or heard of this check until

this time, when it was brought there for deposit. When we received the check we gave them credit for it as cash. I heard the testimony of Mr. Hills in regard to the conversation he claimed to have with me at some railroad meeting. *As I had no knowledge at that time of the existence of the check, I had no conversation in relation to it. I frequently had conversation with Mr. Hills and I apprehend that he is mistaken as to the time; I might have had that conversation, but I had no conversation at that time with him on that subject;* I did not know at that time that the bondsmen were trying to be released, nor did I know that the check was issued. *Mr. Hills must be mistaken as to the time.*

### Cross-Examination.

*By Mr. Wilkes:*

I have no recollection of meeting Mr. Hills on the evening of the 12th; I am unable to state whether I was at that railroad meeting or not. I do not remember whether there was a railroad meeting. I do not remember whether I met Mr. Hills on that occasion. I could not have spoken to him about this check, for I could not have spoken of what I did not know, and I knew nothing of the check.

Witness McKinney (R. 98), president of the Sioux Falls National Bank, and was in January, 1886:

Curry and myself counted the money for the depositors. I told Curry, "Make out a book for this deposit," and he went and got a book and asked in whose name to make it out, and either Mr. Bailey or Hollister said, "Make it in the name of Hollister, bondsman, as bondsman." * * * I don't think I asked Mr. Hollister to endorse any checks or drafts. Those that were made payable to C. K. Howard were not endorsed at all. *He said they were in charge of the funds of the county*

*treasurer, and "I ought to have a right to endorse for Mr. Howard:" and I think he did endorse in the name of "C. K. Howard."*

### Cross-Examination.

Q. *You say Mr. Hollister stated they were in charge of the funds of the county treasurer?*

A. *Yes, sir; had charge of the funds while he was getting his bond. I suppose he claimed to deposit these funds in the character of bondsman. That is the way the deposit was made out.* I think Mr. Hollister was the first one who spoke to me about taking this deposit made by the bondsmen; that was about half-past two or three o'clock in the afternoon of January 13th, the time they brought it there for deposit. I think I had some conversation with D. R. Bailey, prior to that; it was right after dinner; I was sitting in the directors' room, where I could see into the teller's desk. I think Mr. Bailey dropped in and I gave him a cigar and asked him where he had been for the last two days; he said he had been busy; I think engaged in behalf of the bondsmen of C. K. Howard, getting out on the bond; that J. B. Young had left and they wished to be released, and that office had been turned over to the bondsmen with the money.

The foregoing is all the evidence submitted concerning the action of the county commissioners. What was its legal effect.

## Power of County Commissioners.

### The Law as to This.

The following are the statutory provisions relating to the powers of the commissioners and the obligation and duties of the county treasurer:

§592. 3. To audit the accounts of all officers having the care, management, or collection or disbursement of

any money belonging to the county or appropriated for its benefit.

6. To do and perform such other duties and acts that boards of county commissions are now or may hereafter be required by law to do and perform.

Compiled Laws Dakota, §592, ¶3 and 6.

§637. It shall be the duty of the county treasurer to receives all monies, belonging to the county, from whatever source they may be derived, and other monies which by law are directed to be paid to him, and all monies received by him for the use of the county shall be *paid by him only on the warrant of the board of county commissioners drawn according to law*, (not turn over to bondsmen) and all other monies shall be paid over by him as provided by law. (And to his successors).

Compiled Laws Dakota, §637.

§639. The books, accounts and vouchers of the county treasurer, and all monies, warrants, or orders, remaining in the treasury, shall at the time be subject *to the inspection and examination of the board of county commissioners*, and at the regular meetings of the board in January and July, of each year, and at such other times as they may direct, he shall settle with them his accounts as treasurer, and for that purpose *shall exhibit to them all his books*, accounts and monies, and all vouchers shall be retained by them for evidence of his settlement; and, if found correct, the accounts shall be so *certified: if not*, he shall be *liable* on his bond.

Compiled Laws Dakota, §379.

§1598. Territorial warrants are receivable for the amount payable into the territorial treasury on account of the general territorial tax; and county warrants are receivable at the treasury of the county for the amount of county tax payable into the county treasury, except when otherwise provided by law; and city warrants shall be

received for city taxes; and school warrants shall be received for school taxes in the districts where such warrants are issued; but *United States treasury notes or their equivalent only* are receivable for such taxes as are or may be required by law to be paid in cash; and road and poll taxes may be discharged as provided in section 1589.

Compiled Laws Dakota, §1598.

§1604. The county treasurer is required to keep a cash book in which he shall enter an account of all monies by him received, specifying in proper columns provided for that purpose the date of the payment, the number of the receipt issued therefor, by whom paid, and account of what fund or funds the same was paid, whether territorial, county, school, road, sinking fund or otherwise, and the amount paid in warrants, orders or receipts, each in separate column, and the total amount for which the receipt was given in another column; and the treasurer shall keep his account of money received for and on account of taxes separate and distinct from monies received on any other account, and shall also keep his account of money received for and on account of taxes levied and assessed for any one year separate and distinct from those levied and assessed for any other year, and all entries in said cash book of money received for taxes shall be in the numerical order of the receipt issued therefor.

Compiled Laws Dakota, §1604,

§1656. If any county treasurer shall fail to make return, fail *to make settlement or fail to pay over all money with which he may stand charged*, at *the time and in the manner prescribed by law*, it shall be the duty of the county clerk, on receiving instructions for that purpose from the territorial auditor, or from the county commissioners of his county, *to cause suit to be instituted against*

*such treasurer* and his sureties or any of them, in the District Court of his county.

Compiled Laws Dakota, §1656.

§1657. Whenever suit shall have been commenced against any delinquent county treasurer as aforesaid, the the board of county commissioners of such county may at their discretion remove such treasurer from office, and appoint some suitable person to fill the vacancy thereby created, as hereinbefore provided.

Compiled Laws Dakota, §1657.

§1658. The county commissioners of any of the counties of this territory may require the county treasurer to give additional freehold sureties whenever in the opinion of a majority of the commissioners the existing security shall have become insufficient; and said commissioners are hereby also authorized and empowered to demand and receive from said county treasurer an additional bond as required by law, with good and sufficient freehold security, in such sum as said commissioners or a majority of them may direct, whenever in their opinion more money shall have passed or is about to pass into the hands of said treasurer than is or would be recovered by the penalty in the previous bond.

Compiled Laws Dakota, §1658.

§1662. If any county treasurer shall loan any money belonging to his county, with or without interest, or shall use the same for his own individual purpose, he shall forfeit and pay for every such offense a sum not exceeding five hundred dollars nor less than one hundred dollars, to be recovered in action at law at the suit of the Territory of Dakota for the use of the county.

Compiled Laws of Dakota, §1662.

§1665. If any county treasurer, other officer or person charged with the collection, receipt, safe-keeping, transfer or disbursements of the public money or any

part thereof, belonging to the territory or any county, precinct, district, city, town or school dtstrict in this territory, shall convert to his own use or the use of any other person or persons, body, corporate, association or party whatever, in any way whatever; or shall use by way of investment in any kind of security, stocks, loan, property, land or merchandise, or in any other manner or form whatever; or shall loan with or without interest to any company or corporation, association or individual; or if any person shall advise, aid or in any manner knowingly participate in such act, every such act shall be deemed and held in law to be an embezzlement of so much of said money or other property as aforesaid, as shall be thus converted, used, invested, loaned or paid out as aforesaid, which is hereby declared to be a high crime or misdemeanor and upon presentation, trial by indictment and conviction thereof before any Court of competent jurisdiction in this territory, such county treasurer or other officer or person, shall pe sentenced to imprisonment in the penitentiary and kept at hard labor for a term of not less than one year nor more than twenty-one years, according to the magnitude of the embezzlement, and also to pay a fine equal to double the amount of money or other property so embezzled as aforesaid; which fine shall operate as a judgment at law on all the estate of the party so convicted and sentenced, and shall be enforced by execution or other process for the use only of the party or parties whose money or other funds, property, bonds or securities, assets or effects of any kind as aforesaid have been so embezzled; and in all cases such fine so operating as a judgment shall only be released or entered as satisfied by the party or parties in interest as aforesaid.

Compiled Laws Dakota, §1665.

§1384. Every officer elected or appointed under the

laws of the territory, on going out of office at the expiration of his term thereof, shall deliver to his successor in office all public moneys, books, records, accounts, papers and documents in his possession belonging or appertaining to such office.

Compiled Laws Dakota, §1384.

§643. The county clerk shall attend the sessions of the board of county commissioners, and keep a true and full record of their proceedings in books to be provided for that purpose.

Second. Construction of these statutes.

The Supreme Court of Illinios in 95 Ill., 256, under similar statute:

"It must be borne in mind that there is a broad distinction between individual and official acts performed by the same person. What an individual may do in reference to his own private affairs will bind him unless the act be prohibited by law or sound public policy; but an officer, or a body of officers, can lawfully only perform such acts as are imposed or authorized by the law. When they transcend the limit of the power conferred, the act is void. They are limited and controlled in their official acts, and they are not, unless authorized, empowered to do or not to do official acts. In this class of cases they are empowered, and it is enjoined on the board to require a sufficient bond from the treasurer, and to approve it. They have no power to dispense with the duty, nor can they without a proper consideration, *release sureties from their obligations under the bond.* If they were to do so, in fraud of the rights of the people, the act would have no binding effect, and would be void. There can be no question that the treasurer could only discharge himself for county funds in his hands by paying to the county, *in money, county order or jury warrants.* The statute requires him to pay in such funds. It is not intended that he may pay in promissory notes, checks, drafts, or other paper. And if, after Whittaker absconded, any such paper came into the hands of the county, or under its control, that did not operate as a

credit or set off except so far as money had been received on them."

Cawley et al. *v.* The People, 95 Ill., 246.

In 15 N. W. 369, the Supreme Court of Nebraska, in a suit brought against a county treasurer, after expiration of his term and the turning over of funds to his successor for some $3,500, which was paid by a certificate of deposit on a Yanton bank, and offered in evidence under plea of payment, said: "Section 94 of the Revenue Act provides that the treasurer on going out of his office shall deliver to his successor in office all public moneys, etc., in his possession." And the next section declares that if he "shall fail * * * to pay over all moneys with which he may stand charged at the time and in the manner prescribed by law it shall be the duty of the county clerk on receiving instructions * * * to cause suit to be instituted against such treasurer and his sureties. * * * Both the law and the official bond united in requiring him to hand that over to his successor. The delivery of farmers' certificates was not payment, for they were only the promises of a stranger to pay money. Even if Howard, the successor, did agree to accept these certificates in payment—no money having been realized from them it could avail the defendants nothing as against the county."

Cedar County *v.* P. Jenal, 15 N. W., 369.

Clay County *v.* Simonson, 1 Dak., 403.

The Supreme Court of Michigan in Perley *v.* County of Muskegon, 32 Michigan, p. 139, says:

"There is no law authorizing any one but the treasurer to handle or intermeddle with the funds, but only to investigate the accounts. If he accounts fairly, and meets all obligations as presented, there can usually be no occasion to inquire further, and no such duty has been imposed of counting as is required for state monies."

32 Michigan, p. 139.

In Ruckles *v.* State, 1 Oregon, p. 349, the Court says:

"A board of county commissioners is a tribunal of limited jurisdiction. It possesses the power to fill a vacancy, because that power has been conferred by statute; and if

the power to require a new bond, rests in that body, it is because that power has also been delegated to it."

And such grant of power must be strictly construed.

1 Dillon Mun. Corp. 4th Ed., §22 *et seq.*
Starr *v.* People, 102 Ill., 343.
Hewitt *v.* District, 94 Ill., 533.
School Directors *v.* Fogleman, 76 Ill., 190.
People *v.* Johnson, 100 Ill., 539.

In the case last cited the Court held that municipalities have no implied powers to execute or *deal* in commercial securities. *That would give them a character foreign* to their creation and duties.

Starr *v.* People, 102 Ill., 543.
State *ex. rel.* Grady *v.* Commissioners, 25 Na., 91.
Berry *v.* Hamby, 1 Scan. U. S.. 468.
Heald *v.* Bennett, 1 Doug. Mich., 513.
Dickinson *v.* Gilliland, 1 Cow., 481.
Harriman *v.* Sherman, 24 Kan., 387.
Wright *v.* Bailey, 26 Texas, 730.
Jackson *v.* Bartlett, 8 Johns, 361.
Beers *v.* Henderson, 45 N. Y., 665.
Ward *v.* Smith, 7 Well, 437.
Gaded *v.* Patterson, 13 Ia., 256.
Elliott *v.* Miller. 8 Mich., 137.
Woodbury *v.* Lewis Walker, ch Mich., 259.
State *v.* Commissioners, 25 N. W., 91.
Cheming *v.* Supervisors, 5 Den., 517.
Howe *v.* State. 53 Miss., 57.
Henderson *v.* Sibley Co., 28 Minn., 515.

We have therefore, shown, first by our statutes; second, by decisions under similar statutes, that the action on the part of the board of county commissioners was absolutely without authority of law. We have also shown by testimony that the bank could not dispute; testimony of the officers themselves, who were present at the time of the taking of the deposit; that they knew the county had done an unlawful act in attempting to intermeddle with the funds belonging to the county treasurer.

How then, could title pass to this instrument or certified check negotiable in form.

For a moment, for the purpose of argument, let us suppose that the commissioners had power to turn this fund over to the bondsmen. Notice their manner and action. On the 13th of January, the day that this check was presented by the plaintiff bank, Mr. Jones, one of the county commissioners, at the request of Bailey, attorney for the bondsmen, introduced the resolution found on page 79 of the record, reciting that the bonds heretofore given by the county treasurer had

"Been rendered *less strong* by the removal from the county and territory of one of the sureties upon said bond, J. B. Young."

They resolved "That the county treasurer be required to give additional freehold sureties in the penal sum of fifty thousand dollars, it being the opinion of a majority of said board that the existing security had become insufficient for the proper indemnity of said county." "That the funds presented to the board of county commissioners by the treasurer, Howard, are hereby turned over to the bondsmen, and the funds are put in charge of the bondsmen until additional bonds are furnished, said funds to be deposited and remain the funds of Minnehaha county."

Now, granting that the commissioners had power to take this fund in this manner (which we deny), it is not plain that the fund is still to "remain the fund of Minnehahaha county," and what title can the plaintiff acquire under such resolution, having full notice of it. Simply a bailment of the bondsmen's bonds.

This was the condition of affairs at the time the suit was brought by the plaintiff bank, and the condition of the check in suit, as it was a portion of the deposit and a portion of the funds of Minnehaha county. On the 18th day of January, five days after the commencement of the

suit, the *vouchers and accounts having been found correct, settlement was approved, as per statement filed January 12th.* Thereupon Howard tenders his resignation as county treasurer, and *C. L. Norton, the cashier of plaintiff bank*, was appointed by the commissioners to the office of county treasurer as Howard's successor, and he is required to give a bond in the sum of one hundred thousand dollars. On the 19th day of January the commissioners resolve "that the bondsmen of Howard be, and they are directed to turn over to the county commissioners all the evidences of deposit and all funds belonging to the county of Minnehaha." On the same day the oath of Norton was filed and bond approved and on the same day, six days after the commencement of this suit, the check of the bondsmen, in the sum of $27,236.63 "certified to by C. E. McKinney, president of the Sioux Falls National Bank, was issued in full discharge of said bondsmen for the funds received of the county of Minnehaha January 13th, was issued and accepted on the following vote: Yeas: Bannister, Thompson and Berdahl. *Nays: Jones.*

Records of Commissioners, p. 79 and 80, R.

It will be noticed in this connection that Jones, the commissioner who presented originally this resolution, perhaps in ignorance, and *then* in good faith, voted against his resolution after suit had been brought by the Sioux Falls National Bank on this check, during the time that he supposed, and by the language of his resolution, the funds were to remain the funds of Minnehaha county. While the commissioners appeared to receive this check as cash, as a part of the deposit, they seem to be more careful in the receipt that they require of Mr. Norton, the succeeding treasurer, and cashier of this plaintiff bank. In that receipt it is recited: "Received of the county commissioners of the county of Minnehaha and

territory of Dakota, the sum of $27.236.93 *in currency, being funds belonging to the county of Minnehaha.*" There Mr. McKinney, the president; Mr. Norton, cashier, and as county treasurer, and in these various capacities, gave a certified check signed by the bondsmen, and in the receipt the cashier of the plaintiff bank, by express words, recognizes the whole sum of deposits, including this check, as "being the funds belonging to Minnehaha county," and prior to that time an attachment had been issued by this plaintiff bank.

It will also be noticed that when the commissioners were meddling with the funds of the county treasurer, they first recite in their resolution that owing to the absence of one of the sureties without the territory the bond had become less strong. In another portion they recite "the existing security has become insufficient." Now which is true? If it has become *less strong* or *insufficient*, arguing for its sake, that this power existed in them, how can it be said that the county acted in good faith turning over some twenty-seven thousand dollars belonging to the treasurer to his confessedly insufficient bondsmen? Why not take charge of it themselves; hold the money themselves instead of turning it over to the worthless bondsmen? Why does Jones vote against his own resolution? Is it proper for us to suggest the absence of his testimony from the trial? It will further be noticed that both of the commissioners who testified at the trial, did not seem to know when or how the funds were turned over to the bondsmen. The resolution was presented by an attorney for the bondsmen, who induced Mr. Jones to introduce it. They both testified, as we have shown, that Howard was in charge of the funds until the bondsmen took them. Every circumstance goes to show a preconcerted action on the part of the commissioners to promote the conspiracy plead in the an-

swer of the defendant on the part of the commissioners acting through a majority. This is shown by the direct evidence of Mr. Wilkes, he having notified the commissioners not to take into consideration this check as representing money. That was itself corroborated by the actions of the commissioners in the manner of the drawing of these resolutions: in the manner of turning it over to the bondsmen: in the manner of the bondsmen offering this deposit first one place and then another until they could get some bank to take it as cash, running their own risk on collection.

The position is corroborated by even McKinney himself, as he knew as testified by witness Brace and Carpenter, officers of other national banks in Sioux Falls, that the commissioners were settling with Howard and wondered who would get the deposit. Bailey told him that the funds were turned over by the county commissioners to the bondsmen; as by his own testimony Bailey told him so. He does not pretend to dispute witnesses Brace and Carpenter in their testimony.

Curry, the assistant cashier, who helped count the deposit, and who made out the bank book, knew the night of the issuance of the check, saying that it was out and there would be a change in the deposit and who would get it. Curry does not dispute having such a conversation the day before the bank took the check, but says that Mr. Hills must be mistaken in point of time. That could not be so as that was the only evening in the world that he could have had such a conversation, as the check was issued on the 12th and deposited the very next day, at two o'clock in plaintiff's bank, and he made out the deposit book for the bank.

Again, the witness Clover, editor of a paper, whom Curry sought to publish and approve the actions of the Sioux Falls National Bank; Curry said to him that Bailey

assured him the check was all right and if the First National did not pay it, it would "bust the bank." Now the conversation that Bailey had was with McKinney, not Curry. Curry must have learned, in the very nature of things, of the conversation between McKinney and Bailey, as it was there undoubtedly that Bailey used the expression that the First National would have to pay the check or "bust the bank." This assurance then, on the part of Bailey that it would be all right, was by the uncontradicted testimony before the bondsmen went into the back door of the plaintiff bank and made this deposit.

All this evidence ought to have been submitted to the jnry for their determination.

### Doctrine of Innocent Purchaser.

The Assignment of Errors, 304, we have put in issue, the questions of "*good faith*" in the acquisition of the check in suit, and whether the several elements exist necessary to constitute the plaintiff an "innocent purchaser."

First. Further evidence that ought to have been submitted to the jury bearing on this issue, (all of which is found collated on pages 48 to 107 of Record).

At the request of the bondsmen, when funds were offered for deposit at the Dakota National Bank, Witness Irvine, (p. 76), bank clerk for Dakota National Bank, at 11 o'clock in the forenoon, presented check for payment, which was refused, Wells saying, "we don't propose to pay it."

Witness Schaetzel (R. 63), testified:

"A. I came into the office (Cataract House, January 13th), I saw Mr. McKinney and Mr. Henry Corson, I think, and one other man was standing there, and I heard them talking about a check, and Mr. McKinney asked: 'What is it; a straight cashier's check?' And I think Mr. Corson said 'yes.' He says: 'I would like to have it; they would either pay it or close their doors.'"

Q. What time in the day was that?

A. That was between half-past 12 and 1 o'clock. Mr. McKinney was boarding at the Cataract House at that time.

Witness Hollister (R. 58) testified:

I left the trunk in the Dakota National Bank with Mr. Brace when I went home to dinner, and he set it in the safe. After dinner we went and got the box and took it down to the Sioux Falls National Bank, Mr. Coats and Mr. Corson were with me at the time. There was no one else with us. We went out the back door of the Dakota National Bank and into the back door of the Sioux Falls National Bank. In the Sioux Falls National Bank we met *Mr. McKinney*, president; *Mr. Norton*, cashier; *Mr. Curry*, assistant cashier, of the Sioux Falls National Bank, and *Mr. Bailey*. (R. 39). I think that was all. I had seen Mr. Bailey before and since dinner. I think it was between 1 and 2 o'clock in the afternoon when we went into the Sioux Falls National Bank. I did not endorse that check and was not asked to endorse it. We were not in the bank-room, but in the back office. There were three rooms. In going into the back door there is a kind of store-room, and the next door opens into the back private office, and the next room is the banking room proper where the counter is. I do not know whether I was asked to endorse other checks or not. I endorsed them, however. The omission to endorse this check was not a mistake. We were not asked to endorse it.

Q. Was it not a fact that it was an understanding that they should take it without endorsement?

A. Mr. Bailey said ——

Plaintiff's counsel object as hearsay.

*Court:* Conversation with Mr. Bailey, unless the officers of the bank were present would not be competent.

Q. Do you know of anything Mr. Hollister, that was said in the bank-room of the Sioux Falls National Bank that Mr. Bailey had been to see Mr. McKinney in regard to this deposit?

A. He told me so before we went down.

Q. Do you remember of anything being said by anybody present in the bank-room of the Sioux Falls National Bank as to Bailey's being there before that time concerning this deposit?

A. Why Bailey said —— (R. 60).

Q. Anything said by anybody in the bank?

A. Not in the bank. Mr. Bailey did not go with us to the bank. He must have gone the front way. He was there or came in soon after, just about the time we did. I do not think he was in the bank when we came in. We left him at the Dakota National Bank. I should think out of the whole number there was over two thousand dollars in checks and postoffice orders and all that I endorsed. I think there were five or six of those instruments making up the two thousand dollars.

Q. Now, Mr. Hollister, what was the first thing that you said when you went into the back door of the Sioux Falls National Bank?

A. Well, I presume I said something:—"I have brought you a deposit," or "here it is," or something of the kind.

Q. Did you say "I have brought you the deposit"?

A. "I have brought you a deposit" or "the deposit" or something of that kind. I cannot remember just what I did say. *I referred, of course, to the county deposit. It was understood that it was not my deposit.*

Q. Did you tell Mr. McKinney in that conversation that it was the county funds you were bringing?

A. Yes, sir; because the books showed that. It was written bondsmen; was very particular about that, be-

cause I did not want it put in any other shape only as the county.

Plaintiff admits that this check was given on the 12th day of January, payment demanded on the 13th and refused, and this suit was commenced on the 14th.

Witness Clark G. Coats, (R. 65). The witness after describing the same as preceding witness the manner of going to the bank, continued:

I heard nothing said between the bondsmen and Mr. McKinney in regard to his taking this check to collect. I think Mr. Bailey after this money had been counted said to Mr. McKinney, "That is a pretty good-sized check; you had better go and get your money on it." *Mr. McKinney said that he would collect it or see that the doors did not open the next morning.* I think that was about the way. It might not have been worded just that way.

Witness Samuel T. Clover (R. 67), testified:

I reside in Sioux Falls; in January, 1886, I was publishing the Sioux Falls Leader. Am acquainted with Arthur Curry; at that time he was assistant cashier of the Sioux Falls National Bank. On Friday morning, January 15, I had a conversation with him concerning the issuance of a check for $16,000, issued by the First National Bank of Sioux Falls to C. K. Howard. Mr. Curry came down to my office on Friday forenoon, the 15th, and commenced a conversation by asking me if I had written up an article relative to the issuance of the bank check, or rather on the subject in relation to the bank check. I said that I had not—that I was investigating and trying to get the meat of the matter and wanted to give the facts as they stood. He then said that the Sioux Falls National Bank had done a great deal for me, and now was a time for me to stand by them; it was a matter of vital importance to them, and em-

phasized that several times. I said I realized that, of course, but I could not give more than the facts in the case and I did not propose to; I was going to give the facts and that was all I could do. Then he commenced talking about the check: he said the bank had got the check and invited me down to look at it and I did later on; then I asked him how he came by the check and how he got it, and he proceeded to tell how the bondsmen came down in company with Mr. Bailey, to the office of the bank on Thursday, that is the day previous, and Mr. Bailey acted for the bondsmen and they had got the check, and he assured them it was all right. I remember of questioning him closely about it, and he told me they were all right, anyway. *Mr. Bailey had assured him that they were all right and they would either have to pay, the First National Bank would have to pay the check or they would "bust" the bank.*

Witness R. J. Wells, (R. 69) after stating the presentation of the check as related by witness Irvine, (R. —) testified:

In the afternoon of the same day, the 13th, Mr. C. E. McKinney presented the same check. Payment was refused upon it at that time. That same afternoon Mr. C. L. Norton presented it also for payment, and it was refused again, and on the evening of the same day Mr. C. L. Norton, the cashier of the bank, called at my house, and not finding me at home came up to Mr. Wilkes' and stated to us that there would be trouble on the morrow if we did not pay that check, and after considerable conversation, we three went down to the Sioux Falls National Bank and there met Mr. McKinney and Mr. Keith, one of plaintiff's attorneys. We said to Mr. Norton and Mr. McKinney, in the presence of Mr. Keith, that this check had been obtained from the First National Bank without any consideration and had been fraudulently di-

verted from the purpose for which it was issued, and now they had better charge this check back to the party from whom they got it. They said they admitted they paid nothing for it, but that was not the way of doing things, and they proposed to make us pay it. We had a long conversation. After repeated urging for them to take it back, we strongly insisted that they should do so, *Mr. Norton replied that they would not do that—they couldn't do it, and if we did not pay it they knew a way to make us pay it, and that mighty quick, too.* Mr. McKinney also said that they would not charge it back and appealed to Mr. Keith, and I think Mr. Keith asserted as a legal proposition they could not charge it back. Mr. Wilkes also stated the same thing to them and got substantially the same reply. Mr. Peck came down, I (R. 70) think, while we were there and the conversation was carried on in that strain, and we went and got Mr. Furbeck, and it was then continued, we urging them to pursue the usual friendly course between banks and not to inaugurate to run, they insisting that they wouldn't do it. I said this to him, among other things: I know I said that I did not recognize that he had any right to that. He said as being county paper—he said he wanted the county deposit—something to that effect. My recollection is that I stated to him that the check did not represent anything to us, did not represent any consideration, and we would not pay it. Subsequently they both came up to the bank.

Witness Porter P. Peck (R. 72) testified:

A. I was in the Cataract House part of the evening and in various places around, but later in the evening I was in the banking house of the First National, also was down in the Sioux Falls National. Mr. Wilkes was with me when I went there. Mr. Wilkes requested Mr. McKinney and Mr. Norton, as president and cashier of the

Sioux Falls National, not to press the First National for the payment of that check, but to charge it back to the parties, as it was dishonored for the reason of the bank's not having received any value therefor, and insisted upon their not pressing the payment, but to charge it back; that was the burden of the conversation. Mr. McKinney said he should insist on the First National folks paying the check.

Witness W. H. Corson, one of the proprietors of the Cataract House, (R. 74), after stating his acquaintance with the parties, testified:

Q. Did you agree to endorse it?

A. We did not.

After or before dinner—a very short time after we came out of the bank—Mr. Bailey met Mr. Hollister some place and Harry (Hollister) came over to me and said: "The Sioux Falls National will take the check and give us credit for that amount of money." I told Harry that it was my idea that it was the best thing that we could do. After dinner we went over together and took it down to the Sioux Falls National bank. We went out the back door of the bank and took the river route and went into the back door of the Sioux Falls National. I think we met Mr. McKinney, Mr. Norton and Mr. Bailey at the Sioux Falls National Bank. I don't know; there might have been some other parties there. Mr. Hollister carried the box. *I think Mr. McKinney said if the check was not paid the bank would not open their doors tomorrow morning.* There was some little caution that I was to take care of myself. I wanted to come—get out as quick as possible.

Q. What was the occasion of so much haste? (R. 75).

A. Well, I knew there was a question in regard to this check, of course.

Q. Do you remember, Mr. Corson, of his using an

expression like this, cautioning you not to say anything about the check having been presented?

A. I think there was such a conversation, but when it occurred I could not tell. I could not tell whether it occurred at that time or some other. I know they sent for us to come down the next morning. It might have been at that time or some other time. I think Mr. McKinney sent for myself, Mr. Hollister and Mr. Coats.

Q. Is it not a fact that he cautioned you about saying anything about the check to anyone?

A. I don't recollect that Mr. McKinney cautioned us about saying nothing about the check to any one. I heard such a remark, but who it came from I do not know. I could not identify the parties who spoke of it. I know it was talked among ourselves that we had better know as little about it as possible. I think that conversation was had by some of the parties I have mentioned. But I do not know who it was made by nor who was present, or anything about that part of it. I could not tell whether it was in the bank or where it was, I am not sure.

Cross-examination by Mr. Keith (R. 75).

We went down to the bank the next morning after we made the deposit. In the meantime the Sioux Falls National had presented the check. It was not on that occasion that he said that if they did not pay it their doors would not open to-morrow morning. I am quite sure about that, because Mr. Coats and I were talking about it afterwards, and he asked me if I recollected that conversation. It was quite a good while afterwards that we had that conversation. I was before the county commissioners on January 13, about the time that this check was delivered to the bondsmen. *I knew that this matter was going to be handled in that way.*

I had a conversation at their bank with Mr. McKinney

and Mr. Norton concerning the check in the evening of the 13th of January; there were present Mr. Norton, Mr. Keith, Mr. McKinney, Mr. Wells, Mr. Furbeck, and myself, part of the time and later in the evening Mr. Peck and Mr. McKinney, with myself, were present. I went there in company with Mr. Norton and Mr. Wells. While there I said to Mr. McKinney substantially what we wanted them to do, that we wished them to charge this check back to the depositors from whom they got it and not to get into any law suit which would be injurious to both of the banks and the community. I used the expression over and over again, you have not paid out anything on it, you have not suffered anything on it, charge it back. They declined to do so, and Mr. McKinney replied at one time during the conversation substantially like this: The First National Bank has been doing that thing off and on, time and time again for years, and we don't propose to charge it back, and he refused to do so. Later in the evening, after going to the First National Bank, Mr. Peck and I went down there alone and I renewed the conversation with Mr. McKinney on the same subject and endeavored to have them charge the check back, which they refused to do and brought suit the next day.

Witness C. E. McKinney (R. 98), among other things, testified as follows:

At the time the deposit of the county funds was made by the bondsmen I think Mr. Hollister, Mr. Coats and Mr. Corson came to the bank; also Mr. Curry, Mr. Norton, Mr. Bailey and myself were present. When they came into the bank I was busy in the front part, our banking room. I don't know as a matter of personal knowledge which way they came into the bank. When I first saw them they were in the rear part of the front room—that is what we called our directors' room and

real estate office. As I came into the room and saw them there, Mr. Hollister was standing by an upright desk along the side of the room. He said: "I (R. 99) have brought you a deposit. I make it about so much. You count it over and see if I am correct." As he said that he turned out the money. It was composed of bills, silver, gold and checks, I began counting the money. Mr. Curry came in at that time and I said to him, "Please help me count this deposit." We counted the deposit and as Mr. Norton came in I called to him and said, "Make out a book for this deposit," and he went and got a book and asked in whose name to make it out, and either Mr. Bailey or Mr. Hollister said, "Make it in the name of Hollister bondsmen, as bondsmen." After I counted the money Mr. Curry took it and put it in the front room on the counter where the telling was done and the credit was given. I think Mr. Norton brought back the book and handed it to Mr. Curry, and I think Mr. Curry made the credit and handed it to Mr. Hollister, and the bondsmen left. This check was a part of that deposit. I think that Mr. Curry checked up the checks and I was counting the cash. After he finished that he assisted me in counting the money. I ran the checks over and I think as I came to this I said, "This is a good nice check, a good-sized check," and Mr. Hollister said, "Yes." I said, "That is a good check." He said, "We regard them as cash," and I said, "Certainly." He said, "I want this deposit as cash," and I said, "As far as I see I don't see any reason why not. We consider it as cash; we regard this as cash." I had no knowledge or information from any of these parties that there was anything claimed to be wrong about that check at the time we received it. There was nothing said by any of them with reference to it. I did not have any knowledge or information from any source

that there was anything wrong claimed about this check. (R. 100). It was one of our busy days. I do n't think that I knew anything about this check at that time. I do n't think I had as much as heard the check mentioned at that time. I heard Mr. Hollister's testimony. I do n't think I asked Mr. Hollister to endorse any checks or drafts; those that were made payable to C. K. Howard as county treasurer, are not endorsed at all; he said they were in charge of the funds of the county treasurer and "I ought to have a right to endorse for Mr. Howard," and I think he did endorse in the name of C. K. Howard; that was the extent of it; if he did anything more than that he was not asked to. (R. 101). I did not go to the depositors after I presented the check to the First National and it was not paid and talk with them about it. I do not remember that I ever talked with them about it. I do not remember that I ever talked with them about making the check good to us. We did not charge the check back to them on the books of account of our bank. Up to the time this suit was commenced, we had paid out no money on that account.

## Innocent Purchasers.

### As to the Law.

Innocent purchasers, or by our statute termed "An endorsee in due course, is one who in good faith, in the ordinary course of business, and for value, before its apparent maturity or presumptive dishonor, and without knowledge of its actual dishonor, acquires a negotiable instrument duly endorsed to him, or endorsed generally, or payable to the bearer."

Compiled Laws Dakota, §4487.

Our statute has especially taken notice of good faith and defines it as follows: "Good faith consists in an honest intention to abstain from taking any unconscien-

tious advantage of another, even through the forms or technicalities of law, together with an absence of all information or belief of facts which would render the transaction unconscientious."

Compiled Laws Dakota, §4739.

In the case of Dresser *v.* the Mo. Construction Co., 3d Otto, 93, this Court said: "The notes in question were purchased upon an unexecuted contract, upon which $500.00 had been paid when notice of the fraud and a prohibition to pay was received by the purchaser. The residue of the contract on the part of the purchaser is unperformed, and honesty and fair dealing require that he should not perform it. Certainly that he shall not be permitted by performing it to obtain from the defendants, money which they ought not to pay. As to what he pays after notice he is not a purchaser in good fatih. He then pays with knowledge of the fraud, to which he becomes a consenting party and is in no better condition than if he had not paid at all. He has no greater equity and receives no greater protection. Upon receiving notice of the fraud his duty was to refuse further payment, and the facts before us required such refusal by him.

In Manufacturers' Nat. Bank. *v.* Newell, et al. the Court says:

"The defense interposed was substantial and went to the merits. It was sufficient to bar any recovery, unless the bank was to be regarded as a bona fide purchaser for value of the note, by reason of the mere discount and credit. Such being the facts, we are constrained to hold that the plaintiff's remedy was to tender the note back to the company and cancel the credit. The right to do so is certainly sanctioned by courts of high authority. Bank *v.* Huver, 114 Pa. St., 216; 6 Atl. Rep., 141; Dougherty *v.* Bank, 93 Pa. St., 227; Dresser *v.* Railroad Co., 93 U. S., 92; Scott *v.* Bank, 23 N. Y., 289; Bank *v.* Valentine, 18 Hun., 417; Bank. *v.* Bank, 52 Barb., 592; Platt *v.* Chapin, 49 How. Pr., 318; Payne *v.* Cutler, 13 Wend., 605; Bank *v.* Bank, 1 Hall, 592; Mann *v.* Bank, 30 Kan., 412; 1 Pac. Rep., 579; These adjudications

are to the effect that such mere discount and credit does not constitute a bona fide purchase for value. To be such the holder of the note must actually part with something of value for it. If after such discount and credit, such holder receives notice of the infirmity of the note, he is thereby incapacitated from becoming such bona fide purchaser by any subsequent payment.

In the case of Mann *v.* Second National Bank of Springfield, Ohio, 1 Pac. Rep., 583, the Supreme Court of Kansas says:

"It will be observed that the bank, in fact, paid nothing to the company at the time of the discount. It simply credited the company on its books with the amount of the discount and thereby enlarged the company's account at the bank. Now the bank was a bona fide holder; that is, it acquired title in the first instance without any notice of any infirmity. To what extent is it protected? The general rule in such cases is that a bona fide holder is protected to the amount he has paid or lost by virtue of the discount."

In Bank *v.* Valentine, 18 Hun., 417, it is held that the mere discounting of a note and giving a party credit on the books of the bank does not constitute the bank a holder for value. A similar proposition is laid down in Dougherty *v.* The Bank, 93 Pa., 227. The proposition rests on the plainest principles of justice, and in no manner impairs the desired negotiability of commercial paper. Whenever the holder is a bona fide holder, he has a right to claim protection, but protection only to the extent he has lost or been injured by the acquisition of the paper. But when he has parted with nothing, there is nothing to protect. A mere promise to pay is no payment. He may rightfully say to the party from whom he purchased: "The paper you have given me is valueless, and therefore I am under no obligation to pay," and if the paper be in fact valueless, payment cannot be compelled. Now the relation of a bank to the depositor

is simply that of debtor. The bank owes the depositor so much. If the deposit is valueless, its obligation to pay is without consideration, and it may decline to pay.

The Court in the case last cited likens it unto the doctrine of stoppage in transitu,

In Lennox County Bank *v.* Huver, 114 Pa. Stat., the case of Dougherty *v.* Bank was cited and approved, saying: "We need not repeat what was said in Dougherty *v.* The Bank.

Daniel Neg. Inst. 3d Ed., §758 c, p. 706.
Daniel Neg. Inst. 3d Ed., §789 a, p. 739.
Manf. National Bank *v.* Newell, 37 N. W., 420.
Morse 3d Ed., §603.
Jordan *v.* Bank, 74 N. Y., 467.
Bank *v.* Bank, 2 Hall, 619.
Bank *v.* Bank, 46 N. Y., 82.
Hubbard *v.* Chapin, 2 Allen. 328.
Stevens *v.* Bank, 3 Hun., 147.
Holcomb v. Wyckoff. 35 N. J. Law., 36.
Hollman *v.* Hobson, 8 Hump., 127.
Bank *v.* Chapin, 8 Mete., 40.
Williams *v.* Smith, 2 Hill, 301.
Todd *v.* Shelbourne, 8 Hun., 510.
Buller *v.* Harrison, 2 Cowp., 565.
Garland *v.* Bank, 9 Mass., 407.
Clarke National Bank *v.* Bank, 52 Barb., 592.
Platt *v.* Chapin, 49 Haw, N. Y., 318.

Does the plaintiff's case disclose the first element of an innocent purchaser? Is he a purchaser in good faith? Is he a purchaser in the ordinary course of business? Is he a purchaser for value as meant by law? Is he a purchaser before its apparent maturity or presumptive dishonor and without knowledge of its actual dishonor? Did he ever acquire title to the instrument? This is assuming that the instrument is a negotiable one *under our Code.*

To recapitulate: McKinney wonders who will get the deposit, as does assistant cashier Curry, and says that he

told Bailey, who he knew was acting for the bondsmen and had the funds, that he wanted to get the deposit and saw no reason why he should not get it. That before his conversation with Bailey even. He remarks: "What is it?" "Is this a straight cashier's check? I would like to get it and they would either pay it or I would know the reason why." What can such language mean except knowledge on their part of the prior presentment and dishonor of the check. Immediately on the making of the deposit McKinney again says: "They will pay it or their doors will not open tomorrow morning." He presents it for payment. It is refused. It meets the same reception in the hands of Norton. In the evening Norton, who was a few days afterwards appointed treasurer as Howard's successor, goes to the house of Wells, president of the defendant bank, to warn him of a "run" if the check is not paid. Later the officers of the two banks and their attorneys assemble. The defendant urges that the usual friendly course between banks be adopted and not to inaugurate a run. Plaintiff said they could not charge it back and appealed to Keith, the lawyer, for his advice. It will be noticed that Keith was at the elbow of plaintiff's officers and at the same time was taking advice from the county commissioners. How can this testimony be read and still say that the plaintiff acted in good faith? Does it show an "honest intention to abstain from taking an unconscientious advantage? Does it not rather show a strong desire simply to be certain that the "forms and technicalities of the law" will put them in shape to force the defendant bank to the wall? "Bailey assured them it was all right." Does it show an "absence of information or belief of facts which render the transaction unconscientious?" Does it not rather show a most corrupt conspiracy on the part of the bank officers of the plaintiff to "bust" the bank?

Why did the plaintiff not charge this check back if they were acting in good faith, as shown to be the custom of bankers in this city and throughout the United States, as was its duty under the authorities which we have cited.

Mr. Wade, the author of a work on notice, in February number, 1885, of the American Law Review, says: The jury may find that the facts of which the purchaser had knowledge or information put him upon inquiry, and that if he inquired he ascertained the truth: and if he failed to inquire it was for the reason that the facts with a knowledge of which he already stood charged, were so convincing to his mind that he refrained from further inquiry in order that he might take shelter from the consequences of his duplicity behind his self-imposed ignorance.

Daniel, Neg. Inst., §799.

Can it be said that he acquired the check in the ordinary course of business? We say no, as we do not believe that any Court will say that taking a check of sixteen thousand dollars representing a transaction involving one-third of the capital stock of the bank issuing it, taking it through the back door of the bank, being funds in the hands of the bondsmen of the county treasurer, under and in opposition to a resolution of the board of county commissioners, without endorsement of the parties presenting it, after soliciting the deposit and crediting to the bondsmen as bondsmen, paying nothing for it nor changing their position in any way up to the time of the commencement of this suit, knowing that it would be defended against, that the funds including the check, was simply a bailment in the hands of the party depositing it, knowing as they must know, the law, the incapacity of the party putting the bondsmen in *possession* (not ownership) of the funds; insisting if the bank did not pay, they "knew a way to make them pay it and that mighty quick to;" this remark being made by the cashier

of the plaintiff bank, who was appointed treasurer in Howard's place five days after this suit was commenced, and before the character of the bondsmen as bailee ceased, meets the legal intent of ordinary course of business.

Still the Court directed a verdict against the defendant claiming that all these matters that we have dwelt upon at so much length were not sufficient to show, in the language of the trial Court, "That there is no evidence of notice to the plaintiff bank." We confidently claim error.

## Pretended Estoppel.

We have before remarked that the doctrine of estoppel was not plead, and we now say that its rules do not obtain here, even if plead. We have shown that the county was not harmed by the acquisition of the check. For if they had followed their plain duty prescribed by the statute and instituted suit against the bondsmen, the check could *not have been introduced in evidence to reduce the amount of their liability on the treasurer's bond.* The county was not injured. For a moment let us grant them the authority to take possession of these funds in the manner they did. The resolution particularly says that the funds shall be deposited and remain the funds of Minnehaha county, subject to the order of the county commissioners, and pending time allowed Mr. Howard to get a new bond, possibly with the idea that if new bond was not secured to then commence suit againt Mr. Howard. Under any construction that might be given, the county certainly was not injured. They parted with nothing. We think the Court erred as claimed in assignment No. ——, in admitting in evidence the statement Exhibit "B." as follows:

"The books of the bank show a credit in favor of the county of $15,625.01. If you wish you have the privilege of examining the books."

"R. J. WELLS, President,
"W. F. FURBECK, Cashier."

This grounds of this objection are fully stated on page — of brief and are, we think, all tenable. The commissioners refused to act upon it; refused to take it into consideration and required him to get either the money or a certified check. The balance due the county was $16,571.61, thus showing on the face that Howard was a defaulter of the difference between the statement and the check, or $946.60. They were particular about this check, at the same time they received various checks, amounting to several thousand dollars, ten or twelve in all, that they made no inquiry concerning. None of the parties, at no time, were induced to change their position.

Bigelow on Estoppel, 4th Ed., 679.

A stranger is not bound by, nor can he take advantage of an estoppel whether it arises by deed, record or matter in pais.

Deary's Lessee *v.* Cray, 5 Wall., 795.
Bk. 18., L. C. P. Co. Ed., note and cases cited.
Kent's Com. Vol. 3, 261, 12th Ed.
Bigelow on Estoppel, 4th Ed., 551-2, 564 to 610.

An assignee cannot rely upon estoppel. So a third person to whom the representation was not made cannot claim the estoppel unless it was intended and contemplated that he should act upon it, which was a question of fact for the jury.

Mayenborg *v.* Hayes, 50 N. Y., 675.
Bigelow, 4th Ed., 517, 543, 607, 608, 610.

**Error in Rufusing Substitution.**

This defendant excepted to the order making him an additional defendant, claiming the right absolute of substitution. This exception was settled and allowed by Judge

Palmer, prior to the trial of the case on its *supposed merits.* Assignment of Error No. ....

Section 532 of the Revised Statutes, authorize the comptroller: "On becoming satisfied as specified in sections 5226 and 5227 * * * the comptroller of the currency may forthwith appoint a receiver and require of him such bond and security as he deems proper. Such receiver *under the direction of the comptroller* shall take possession of the books, records and assets of every description of such association, collect all dues, claims and debts belonging to it, and upon order of a Court of competent jurisdiction, may sell or compound all bad or doubtful debts, and on a like order may sell all real or personal property of such association on such terms as the Court shall direct. * * * Such receiver shall pay over all money so made to the treasurer of the Uniten States, subject to the order of the comptroller, and also make report to the comptroller of all his acts and proceedings.

Ball on National Banks, p. 232 and cases.

In Kennedy *v.* Gibson the United States Supreme Court said "the receiver is the statutory assignee of the association, and is its proper party to institute all suits: they may be brought both at law and in equity, *in his* name or in the name of the association *for his use.* He represents both the creditors and the association, and when he sues in his own name it is not necessary to make either a party to the suit.

Kennedy *v.* Gibson, 8 Wall 498.
Thompson National Bank Cases, 21.
National Bank Act and Meaning by Bolles, §328.
Bank of Bethel *v.* Phquioque Bank, 14 Wall 383.
Harvey *v.* Allen, 16 Blatch 29.
Rep. in Brown's National Bank cases, 439.
Casey *v.* Galli, 94 U. S. 673.
Bank *v.* Kennedy, 17 Wall 87.

The receiver then having the right to sue, and under the comptroller's direction the management of all cases concerning the trust, what was his method of procedure.

Section 85 of the Code of Civil Procedure of Dakota says, in case of any other transfer of interest * * * the court may allow the person to whom the transfer is made to be substituted in the action.

The above section is identical to section 121 of the New York procedure.

Wait's Pr., vol. 1, p. 159.
Wait's Annotated Code, ps. 139 and 145.

In Tracy *v.* First National Bank of Selma, 37 N. Y. the court says:

The action was commenced against the bank before the appointment of a receiver, and as far as the papers show, is still in progress under that title. Under sections 121 and 122 of the Code it was competent to the receiver to apply to make himself a party either on the ground that all the *interest of the defendant* had become vested in him, or that the rights could not be properly settled. He made such an application but for some reason, unexplained in the papers, took no order on that branch of the case. The appeal was dismissed upon the express ground that not being a party he had no status in court to prosecute appeal. See also—

Claflin *v.* Farmers and Citizens Bank, 54 Barb. 229.

Wait's Ann. Code, p. 143, and opinion of Judge Blatchford in Harvey, receiver, *v.* Allen, 16 Blatchf. 29. Reported in Brown's Bank cases, 439.

It needs no argument to show the effect of a Court's ordering a suit to be conducted by parties contrary to express provisions of the act of congress. The ground of defense is certainly an asset, as much as the cause of action; then, instead of the "receiver *under direction of the comptroller of the currency*" having charge of the assets, the Court has left and kept that asset the same as

before the receiver's appointment—in the hands of these attorneys under the direction of the Court. There are in this case two parties. Are there two interests? Is it not the one interest represented by this receiver? Who will pay the the costs incurred by the defendant bank since the receiver asked the control of the suit? The comptroller certainly will not pay them; he would have no authority, as it certainly would not be included in expense of prosecuting his trust. It is in effect a conflict between the Court and the comptroller.

The Court in 4 Otto, 680 said:

"That the comptroller has decided to pay a large amount of claims against the bank for which the bank is not responsible, and that aside from these claims, there are means enough already in his hands to meet the liabilities of the bank is manifestly bad. If the receiver intends to violate or shall violate his duty in discharging the trust confided to him the remedy must be sought in another proceeding. The debtors of a bank when sued by a receiver cannot inquire into the legality of his appointment. It is sufficient for the purpose of this suit that he has been appointed and is receiver in fact."

Codle, Receiver *v.* Baker, 20 Wall, 650.

We cite these last two cases to show the manner in which the United States Supreme Court have treated the powers and authority of a receiver.

Respectfully submitted,

T. B. McMartin,
*Attorney for Plaintiff in Error,*
J. Leslie Thompson,
*Receiver of First National Bank.*

APR 23 1893
JAMES H. McKENNEY,

CASE NO. 13,915.

# SUPREME COURT

OF THE

# UNITED STATES.

**OCTOBER TERM, 1892.**

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TERM NO. 284.

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J. LESLIE THOMPSON, as Receiver of the First National Bank of Sioux Falls, Dakota, and the FIRST NATIONAL BANK OF SIOUX FALLS, DAKOTA, Plaintiffs in Error.

*vs.*

THE SIOUX FALLS NATIONAL BANK, of Sioux Falls, Dakota, Defendant in Error.

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## IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF DAKOTA.

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**Brief for First National Bank of Sioux Falls, Plaintiff in Error.**

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R. J. WELLS,
*Of Counsel.*

WM. A. WILKES, and F. L. BOYCE,
*Attorneys for First National Bank.*

WILL A. BEACH, PRINTER, SIOUX FALLS, S. D.



CASE NO. 13,915.

# SUPREME COURT

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*vs.*

THE SIOUX FALLS NATIONAL BANK, of Sioux Falls, Dakota, Defendant in Error.

———:o:———

*In Error to the Supreme Court of the Territory of Dakota.*

———:o:———

**Brief for Plaintiff in Error, the First National Bank of Sioux Falls.**

———:o:———

The Sioux Falls National Bank brought this action in the District Court of the Territory of Dakota for the County of Minnehaha, against the First Nation-

al Bank of Sioux Falls, upon an instrument denominated a cashier's check in the following words:

No. 91. SIOUX FALLS, Dak., Jan. 12, 1886.

"The First National Bank of Sioux Falls, pay to "the order of C. K. Howard, county treasurer, Sixteen "thousand, five hundred and seventy-one and 61-100 "dollars.

"$16,571.61. (Signed) W. F. FURBECK, Cash."

Across the face of which was printed the words "cashier's check," and which was endorsed as follows: "C. K. Howard, County Treasurer." (R. pg. 48.)

The complaint alleges, in substance, that the check was issued for value received and delivered to Howard, who endorsed it, "C. K. Howard, County Treasurer," that "it came lawfully into the possession of the plaintiff in the usual course of business," on the 13th day of January, 1886, and that the plaintiff is "now the legal owner and holder of the same." (R. pg. 30.)

The answer (R. pg. 33) admits the making of the check by Furbeck, who was cashier of the First National Bank, and that the same was in form as alleged in the complaint and has not been paid, but denies all the other allegations of the complaint above mentioned; and as separate affirmative defence alleged in substance, (3) that the check was without consideration and delivered to Howard upon a condition which had not been complied with and wrongfully diverted by him from the purpose for which it was given; that neither the commissioners nor the bondsmen of the County Treasurer ever had any property in, title to, or right to the possession of the check, and that the plaintiff took it in bad faith with notice of this fact, and with notice that it had been dishonored and of the fact that it was not a valid obligation of the First National Bank, and that the plaintiff paid nothing for it until after it had full knowledge of the facts concerning the check as set

forth in said answer, and of the fraud practiced upon the defendant in transferring it, (R. pages 33 and 35); and (4) that Howard, at the date of the check was Treasurer of Minnehaha county, and having his semi-annual settlement with the Board of County Commissioners, and was without sufficient funds to meet his obligations to the county; that the check was obtained by him for that purpose, and as the result of a conspiracy between him and the sureties upon his official bond to defraud the First National Bank of the amount of the check, and thus to relieve the sureties from responsibility to the county for its amount, and that they were aided in carrying out this conspiracy by the Board of County Commissioners, who unlawfully and wrongfully took possession of the check when it was presented to them by the treasurer to be counted, and turned the same over to said sureties, who deposited it to their own credit as bondsmen in the bank of the plaintiff, after its presentment to the First National Bank for payment, and payment had been refused; and the plaintiff received the check with knowledge of said facts, and after being informed by defendant bank of all the facts concerning the check, and being requested to charge it back to the depositors, and before having parted with any consideration on its account, refused to charge it back, and commenced this action. (R. pp. 35–37.)

A ready and correct understanding of the questions involved in this case will be best promoted, it is believed, by a brief recital of the facts which constitute the history, so to speak, of the transaction which led to the issuance of this check, and the institution of this action upon it, with the consequent disastrous results to the First National Bank.

*STATEMENT.*

On January 12, 1886, the date of the check, Charles K. Howard was County Treasurer of the County of Minnehaha, which office he had held for several years prior thereto, and having his semi-annual settlement as such County Treasurer with the Board of County Commissioners. (R pp. 79.) From the time of its organization to the date of said settlement said Howard had kept his official deposit as Treasurer of said County with the First National Bank of Sioux Falls, of which J. B. Young and H. L. Hollister, down to a short time before the issuance of this check, had been President and Cashier respectively; and at the time of this settlement, said Young and Hollister, together with C. G. Coats and W. H. Corson were the sureties of said Howard upon his official bond as County Treasurer. (R pp. 57 and 86.)

At this settlement Howard was in default to the County and to enable him to make his settlement with the Commissioners, applied to the defendant, the First National Bank, for assistance. (R p. 71.) Not having the necessary funds to his credit in the bank, its officers, R. J. Wells, as President, and W. F. Furbeck, as Cashier, delivered to him the check in question upon the express condition then understood between them, that he would not permit the check to pass out of his hands, but would return it in twenty minutes, when he had completed his settlement, and would also place to the credit of the County in the bank what money he had in his possession, as County Treasurer, some twelve or fourteen thousand dollars. (R. pp. 50, 68, 69 and 83.)

Upon presentment of the check to the Board of County Commissioners, with the money which Howard

then had in his possession, being in the aggregate the sum with which he stood charged, according to his account with the County, the County Commissioners required him to endorse the check, and thereupon the said sureties, Hollister, Coats and Corson, through D. R. Bailey, their attorney, demanded that they be released from further liability upon Howard's official bond. (R. pp. 84, 96 and 57.)

The check was never returned to Howard (R. p. 84) nor to the bank, (R. p. 69) and no money was ever received by the bank on its account.

On the morning of the 13th of January, the Board of County Commissioners, deeming Howard's sureties insufficient for the protection of the County, because J. B. Young had removed from the state, passed a resolution requiring the Treasurer to furnish an additional bond of $50,000, (R. p. 79), and, at the same time, at the request of the remaining sureties, Hollister, Coats and Corson, took into their possession all the funds of the County, including this check, (R. p. 84) and, on the same day, by further resolution of the Board turned the same over to said bondsmen with the injunction contained in the resolution, that they should be deposited and remain the funds of Minnehaha County, and put the bondsmen in charge of the office of County Treasurer during the time, as specified in the resolution, that the Treasurer was procuring his additional bonds. (R. p. 79.)

The funds of the treasurer, including this check, were then placed in a tin box, and delivered into the hands of the bondsmen, who took them in the box to the *Dakota* National Bank in the City of Sioux Falls, of which George H. Brace was President and C. C. Carpenter Cashier, and offered the same for deposit; and while there, at about 11 o'clock of the forenoon of that

day, this check, by direction of that bank and the bondsmen, and while the bondsmen remained in that bank, was presented by Frank Irvine, a clerk in the bank, to the defendant, the First National Bank, for payment, and thereof demanded and refused. (R. p. 76.) No deposit was made at that bank, but the box containing the money and check was placed in the vault of the bank until after dinner. During the noon hour, while the bondsmen and officers of the Dakota National Bank were at dinner, Bailey, on behalf of the bondsmen, called at the bank of the plaintiff and had an interview with C. E. McKinney, President of that bank (R. p. 103), and about 2 o'clock in the afternoon, the bondsmen, Hollister, Coats and Corson, after a conference with Bailey, went to the Dakota National Bank, took the box and money, including this check, went out of the back door of the bank (which was in the same block and on the same side of the street with plaintiff's bank) and, following along the river bank behind the buildings which borders the river, to the rear of the plaintiff's bank, entered through the back door of the bank, passing through a kind of store-room to the directors' room or private office back of the main office, and, in the presence of McKinney, there emptied on a table the contents of the box, remarking as they did so, "Here it is." (R. p. 60 and 101.)

About the same time Bailey entered the bank by the front entrance, and McKinney and Hollister, aided by Curry, the assistant cashier, counted the funds. (R. p. 101 and 159.)

Plaintiff knew at this time (R. pp. 100, 103) that these were the county funds, and that the depositors were the treasurer's sureties in charge of his office and funds while he was getting additional bonds, and, upon receiving the deposit, immediately gave to the sureties

an ordinary bank pass-book made out to "H. L. Hollister, C. G. Coats, and W. H. Corson, Bondsmen," and in which it credited them with the amount of the funds, $27,236.63. (R. pp. 62, 63.)

Twice that afternoon the *plaintiff* presented the check to the First National Bank for payment, but payment was refused, the reasons for refusal given (among them that plaintiff had no right to the check, and that the check was without consideration), (R. pp. 69, 70.) and the invalidity of the check explained; and in the evening of that day a conference was held at the bank of the plaintiff between the officers and attorney and those of the First National Bank, at which plaintiff was again notified that the check was without consideration and had been fraudulently diverted from the purpose for which it was issued, and urged and requested to charge the same back to the bondsmen, but refused, saying, "The First National Bank has been doing that thing off and on, time and time again, for years, and we don't propose to charge it back." (R. p. 82.)

The next morning, January 14th, the plaintiff commenced this action and attached the property of the First National Bank.

On the 18th day of January the Board of County Commissioners having found the Treasurer's account correct, by resolution approved the same, and thereupon Howard tendered his resignation as Treasurer, and C. L. Norton, cashier of the plaintiff bank, was appointed as his successor by said board. (R. p. 79.)

The next day, by a further resolution of said board, the bondsmen were required "to turn over to the *County Commissioners* * * * * * all the evidences of deposit and all funds belonging to the County of Minnehaha," and thereupon the check of the bondsmen for $27,236.63, certified by C. E. Mc-

Kinney, as president of plaintift, was accepted by the County Commissioners in full discharge of the bondsmen for the funds received by them on the 13th day of January, 1886, was accepted by the board, and C. L. Norton as County Treasurer receipted to the commissioners for that sum of money in currency. (R. p. 80.)

Prior to the taking possession of Howard's funds and the check in suit by the County Commissioners on January 13th the board was notified that payment of the check would be resisted and warned not to take it. (R. p. 81, 67, 96.)

The case was transferred to Moody County for trial and on the 23d day of June, 1887, the Court upon motion of the plaintiff at the close of the testimony for defendant, directed a verdict for the plaintift for the amount of the check, and in so doing charged the jury as follows:

"It is a fair inference from the testimony, and it seems to be admitted, that Howard was short in his accounts and in his settlement with the County perhaps in the sum of about $16,000, and on the 12th day of January, the First National Bank issued this check, and if in good faith, legitimately, and the law would presume it was done legitimately, although there is some evidence that it was not, then this check was good and there could be no defence to it. If it was issued illegitimately, and for the purpose of deceiving the County Commissioners and to aid Howard in his settlement, they are not in position to defend against it. The case stripped of the husks that surround it is very simple and all the material facts uncontradicted. There is no evidence, even admitting all the defendant's testimony, that the plaintift had notice of any irregularity in the issuance of the check or that there was any defence to it in the hands of any one until the evening of January 13th. If the plaintift had the right to charge it back it was not bound to do it and did not do it, but elected to pursue its remedy against the defendant, as it had a right to do." (R. p. 107.)

The case was appealed to the Supreme Court of Dakota Territory, where the judgment below was affirmed, the Court, although formulating no opinion, giving the following reasons for its decision:

"The cashier's check sued upon in this action upon its delivery to Howard as Treasurer immediately became the property of the county and defendant bank could not be heard to assert its want of power to issue the check or the existence of any fact which might be a defence between itself and Howard in his individual capacity; and the plaintiff having by the transfer succeeded to all the rights of the county, there was no error in directing the verdict of the jury." (R. p. 159.)

Against the foregoing determination, the defendant, the First National Bank, here assigns and urges the following errors:

I.

The District Court erred—

1. In assuming that the check was issued illegitimately, although conceding "that there was some evidence that it was not," and in not submitting that question to the jury.

2. In not submitting to the jury the question whether there was any consideration for the check, or whether it was mere accommodation paper of the defendant bank.

3 In not submitting to the jury the question whether the check was wrongfully diverted from the purpose for which it was issued.

4. In holding and in charging the jury that "if it (the check) was issued illigitimately, and for the purpose of deceiving the County Commissioners, and to aid Howard in his settlement, they, (the First National Bank) are not in position to defend against it." (R. p. 107.)

5. In assuming that there was no evidence that the plaintift had notice of any irregularity in the issuing of the check, or that there was any defence to it until the evening of January 13th, and in not submitting that question to the jury. (R. p. 107.)

6. In holding that the plaintift was not bound to charge the check back to the bondsmen after notice of its invalidity, and a request to charge it back. (R. p. 107.)

7. In not submitting to the jury the question whether the plaintift was an "indorsee (of the check) in due course."

8. In not submitting to the jury the question whether the plaintiff was the owner of the check, or the real party in interest.

9. The Court erred in admitting in evidence against defendant's objections, and for the reasons there stated, the statement "Exhibit B" shown at pages 51 and 52 of the record. (R. pp. 52, 53.)

10. In directing the verdict in favor of the plaintiff.

11. In rendering judgment for the plaintiff.

## II.

The Supreme Court of Dakota Territory erred—

1. In holding that the check "upon its delivery to Howard as Treasurer immediately became the property of the county." (R. p. 160.)

2. In holding that the First National Bank "could not be heard to assert its want of power to issue the check, or the existence of any fact which might be a defence between itself and Howard in his individual capacity." (R. p. 160.)

3. In holding that the plaintiff bank succeeded to all the rights of the county in the check. (R. p. 160.)

4. In holding that there was no error in directing the verdict of the jury. (R. p. 160.)

5. In affirming the judgment of the District Court. (R. P. 160.)

6. In holding that the receiver should have been substituted as sole party defendant.

## BRIEF.

### I.

In making its decision, the Supreme Court of Dakota Territory refused to consider as bearing on this case those rules of law that govern the making and transfer of negotiable paper.

Our contention is that if the county in Howard's person received the check and became its owner as the Court said, then the county could be in no better position, legally, than Howard, the individual. The check was not money, but a promise to pay money. The county must then have received it subject to the limitations and conditions upon which it was delivered. The evidence shows that the check was given, not for the purpose of paying to the county that sum to make good Howard's defalcation, but was delivered to Howard to aid him in effecting his semi-annual settlement and accounting with the County Commissioners. The ckeck, it was agreed, should be returned after effecting an adjustment of Howard's accounts, and in twenty minutes from the time it was given to Howard.

C. K. Howard's testimony; Record, pp. 83 and 84;

R. J. Wells' testimony, Record, pp. 68 and 69.

W. F. Furbeck's testimony, Record, p 50.

P. P. Peck's testimony, Record, p. 72.

The assumption, that in view of the foregoing cited testimony, the county, in some intangible way,

separate from Howard, *became owner of the "property" and could enforce payment on the promise, and there could be no defence against it*, is not in line with the general principles of law applied to such cases; nor has any reason been given, at any time, either by the District Court when directing a verdict against defendant or the Territorial Supreme Court on appeal, that to us seems supported by the law as applied to the uncontradicted facts in the case.

The several defences pleaded were ignored by the directed verdict, and the conclusion seems inevitable that such an application of the law as was made by the Court, permits a fraud whereby the corporation county made use of its officers, treasurer and commissioners, to obtain possession of that piece of negotiable paper and then subverts well established principles of law to enforce payment of the check in favor of the plaintiff, who, as the evidence shows, was not an "indorsee in due course" nor even the real party in interest; but merely a bailee of the check.

Geo. H. Brace's testimony, record p. 78;
C. E. McKinney's testimony, record, pp. 100–104.
Jacob Schaetzel's testimonv, record p. 63.
W. A. Wilkes' testimony, record pp. 81 and 82.
P. P. Peck's testimony, record p. 72.

II.

The District Court in charging the jury, uses this language: "If the check was issued illegitimately, and for the purpose of deceiving the County Commissioners, and to aid Howard in his settlement, they (the bank) are not in a position to defend against it."

This construction affirmed by the Territorial Supreme Court assumes that one or another of the following propositions is true:

I. That the County through Howard acquired such a title to the check that the bank could not defend against in an action by the County, even though obtained by fraud and without consideration.

II. That the Commissioners had the legal right to consider this check, in making settlement with Howard, as representing so much money, and that they, as a Board, had before notice of the invalidity or dishonor of the check been misled to their injury, and had taken such official action in the settlement as absolved the Treasurer from some legal responsibilty to the County existing before such notice

III. That the County Commissioners as a Board had a right to become and did become the lawful holders of the check with all the protection accorded to holders of negotiable paper.

IV. That Hollister, Coats and Corson as sureties upon the Treasurer's bond, in taking possession of the check acquired a better title thereto than did Howard, their principal, and become the lawful holders thereof with authority to sue in their own name thereon and with all the rights of a purchaser in good faith therein; or,

V. That the plaintiff in receiving the check was an "indorsee in due course" thereof with the meaning of the Dakota Code; and,

Also assumes that there was no disputed question of fact arising upon any of the foregoing propositions, which it was the province of the jury to consider; or,

VI. That the First National Bank by reason of something connected with the issuance of the check, is estopped from defending against its payment.

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Upon the first, second, third and fourth of the foregoing conditions of recovery, we must consider the pro-

visions of our statute and the decisions of the Court to see what are the legal relations that exist between the Board of County Commissioners and the County Treasurer.

Mr. McMartin, attorney for the receiver of the defendant bank, in his brief cited several sections of our statute bearing on this point; and we deem it unnecessary to repeat the work here that he has done. A correct understanding and application of these several statutory provisions is perhaps the most vital point for consideration in this case, for the reason that this cashier's check was taken away from and out of the control and possession of Howard, the County Treasurer, by the County Commissioners, and that was either against his consent, as he testified, or else, as might be adduced from the testimony, a conspiracy existed between Howard, his bondsmen and was connived at by the County Commissioners, whereby it was agreed that the County Commissioners should take and retain the check in the manner shown by the evidence.

The offices of County Treasurer and County Commissioners are elective. (Compiled Laws, Sec. 574.)

The authority of the commissioners in connection with the finances of the county and their duties in relation thereto, so far as the board has to do with the office of County Treasurer, are limited and fixed by the statute. (Compiled Laws, Sec. 503.) "They shall superintend the fiscal concerns of the county, and secure there management in the best manner; they shall keep an account of the receipts and expenditures of the county.

* * *

Sec. 585. "The said commissioners shall keep a distinct account with the treasurer of the county, in a book to be provided for that purpose, commencing from the day on which the treasurer became qualified and

continuing until the same or another person is qualified as treasurer * * * .'" (omitting the part of the section giving in detail the various matters that such an account shall contain.)

Sec. 639. (See. Mr. McMartin's brief, p. 39). Provides for an inspection, examination, settlement and certifying of the treasurer's accounts, by the Board of County Commissioners.

Sec. 1386. "All elective, county, township and precinct officers may be charged, tried and removed from office for either of the following: * * 8. For a failure to produce and account for all public funds and property in his hands at any settlement or inspection authorized by law."

Sec. 1656. (See Mr. McMartin's brief, p. 41.) Provides for an action against a delinquent treasurer to be brought by the county clerk on instructions from the county commissioners.

Sec. 1567. (See Mr. McMartin's brief, p. 41.) Gives the Board of County Commissioners authority to remove a delinquent Treasurer after suit commenced, as provided in Sec. 1656.

Sec. 1658. (See Mr. McMartin's brief, p. 41.) Gives the Board of County Commissioners power to require additional sureties of County Treasurer.

Sec. 1659. "If any County Treasurer shall fail or refuse to give such additional security or bond for and during the time of ten days, * * * his office shall be considered vacant and another Treasurer shall be appointed agreeably to the provisions of law." And such appointment shall be made by the County Commissioners, as provided in Sec. 1392.

We have here cited so much of the Dakota Statutes as to relate to the authority of the Board of County Commissioners in connection with the office of County

Treasurer; and have seen that the Board have no legal right to the custody of the public funds; the Board must examine and settle the accounts of the Treasurer; and when so doing shall inspect the money in his hands. The power to *inspect* does not imply the power to *take and hold* the county funds, as was done in this case, and this is the more apparent when we remember that the Commissioners give no bonds. Neither may the Board count that as money which is not money; if this were not so, promissory notes, bank drafts, or any other form of promise to pay money, might be used on these official settlements. The statute used the words "all moneys," which can be taken to mean nothing more nor less than what it says.

We now invite a consideration of the several sections of the statute which refer to the power and duties of the County Treasurer. Sec. 637. "It shall be the duty of the County Treasurer to receive all moneys belonging to the County, from whatever source they may be derived * * *" (See Mr. McMartin's brief, p. 39.)

Sec. 639, already referred to, imposes upon the Treasurer the duty of exhibiting to the Commissioners "his books, accounts and *moneys*," and vouchers shall be retained by the Commissioners for evidence of the settlement. Should the Treasurer fail to produce and account for public funds, as provided in Sec. 1387, and the Commissioners then bring an action against him, it is further provided by Sec. 1389: "At any time after the commencement of the action, the Court may suspend the accused from the functions of his office until the determination of the matter, if sufficient cause appear from testimony or affidavits then presented; and if such suspension takes place, the Board of County Com-

missioners shall temporarily fill the office by appointment."

The statute also fully and explicitly provides for the disposition of moneys and other property in the hands of the Treasurer when he goes out of office; (Sec. 1384, Mr. McMartin's brief, p. 42) and Sec. 1391:

"Upon the death, resignation, suspension or removal from office of any officer, all books and papers belonging to his office and all moneys in his hands and all property of whatever kind held by him by virtue of his office shall be delivered to his successor."

The County Treasurer, we must therefore conclude, is the legal custodian of the public funds; and there exists no authority in law for the Commissioners to handle and control these moneys as they did or to make orders directing that the same be turned over to the Treasurer's bondsmen as they did, or that the bondsmen be put in charge of the office of County Treasurer during the time that the Treasurer should be securing further bondsmen as they did. The Treasurer was wholly independent of the Commissioners in the care of the public moneys. It rested with him to say where and how they should be kept. There was no law requiring him to make deposits or to protect deposits. If he did deposit the moneys in a bank instead of retaining the same in his office or elsewhere, then that bank became the debtor of the Treasurer as an *individual* and was in no manner liable to the County in its corporate character for the deposit; the Treasurer is not a bailee of the public funds, but is a debtor, bound to account for the moneys that come into his hands; his liability is fixed by his bond and not measured by the law of bailments.

*Clay County vs. Simouson*, 1 Dak., 431.
*Halbert vs. The State*, 22 Ind., 120.

*Perley vs. County of Muskegon*, 32 Mich., 132.
*Shelter vs. The State*, 53 Ind., 331.
*State of Ohio vs. Harper*, 6 Ohio St. 608.
*State vs. Mississippi Co.* 74 Mo., 413.
*The U. S. vs. Prescott*, 3 How., 578.
*Cedar Co. vs. Jenal*, Neb. 15, N. W. 369.

INDORSEE IN DUE COURSE.

If the foregoing authorities state the law correctly as applied to our case then the Board of County Commissioners had no legal right to the possession and control of this check on behalf of the County, and if the Board did acquire any rights in the check such as would enable them to hold the same or impart title to a transferee they must have taken the paper as an "indorsee in due course," which the Dakota Code defines to be, etc. (See Sec. 4487 Compiled Laws, Mr. McMartin's brief p. 60.)

The check was given to Howard upon the agreement that he would return it and not let it go out of his possession. He was to use it in effecting a settlement, approval and certification of his official accounts.

C. K. Howard's testimony record p. 83.
R. J. Wells' testimony record p. 69.
W. F. Furbeck's testimony record p. 50.

The Board of Commissioners required Howard to endorse the check and then took possession of it, either against his consent or in furtherance of a conspiracy to that end, and dispossessed Howard of the office of Treasurer.

C. K. Howard's testimony record p. 84.
John Thompson's testimony record p. 94.
John McKee's testimony record p. 97.
Record of Commissioners p. 79.

The County Commissioners were notified that pay-

ment of the check would be resisted before they approved and certified to the settlement of Howard's accounts and before the Board had taken any action whereby the County suffered detriment.

E. G. Wright's testimony record p. 76.
W. A. Wilkes' testimony record p. 81.

The plaintiff likewise must hold the check as an indorsee in due course, and to recover upon paper diverted from the purpose for which it was issued or used in a manner different from that agreed upon between the parties must have been a purchaser thereof in good faith in the ordinary course of business and for a valuable consideration.

Wade on Notice 1886 Ed. Sec. 91 and 94 b.
Edmunds on Bills 319.
*Farmers Bank vs. Noxen*, 45 N. Y., 762.
*Wendell vs. Howard*, 9 Wend 170.
*Eaggett vs. Whitiny*, 35 Conn., 367, 373.

There was evidence that plaintiff had notice of the defendant's refusal to pay the check before the same was deposited in plaintiff's bank by the bondsmen.

C. F. Irvine's testimony, record p. 76.
J. Schaetzel's testimony, record p. 63.
C. E. McKinney's testimony, record p. 103–104.
W. H. Corson's testimony, record p. 74.

There is no dispute that prior to paying out anything on the check, which was on January 19, 1886, the plaintiff had full notice of the dishonor and invalidity of the check, and was urged on the evening of the day when it was deposited with the plaintiff to give it back to the bondsmen and not insist on payment of the check. (Pecord pp. 72, 81, 69.) And the rule of law is that, from the time of that notice, plaintiff was no longer protected as a *bona fide* holder of the paper.

*Dresser vs. Construction Co.*, 93 U. S. (L. C. Ed.), Book 23, p. 8.

*Lytle vs. Town of Lansing*, decided January 3, 1893, U. S. Sup. Ct.

*Newman on Bank Deposits*, Secs. 79 and 103.

*Mann vs. National Bank*, 30 Kansas, 412.

*Dougherty vs. Bank*, 93 Pa. St., 227.

*Bank vs. Valentine*, 18 Hun., 417.

*Balback vs. Erelinghuysen*, 15 Fed. Rep., 683.

*Morse on Banking*, p. 427.

*Randolph on Commercial Paper*, Secs. 452 and 1005.

*First Daniel's Negotiable Instruments*, 739.

*Nat. Gold Bank vs. McDonald*, 51 Cal., 64.

*Second Nat. B. vs. Western Nat. B.*, 34 Am. Dec., 300.

WANT OF CONSIDERATION—ACCOMMODATION PAPER.

That the check was without consideration was practically conceded by the District Court in the charge to the jury. It is apparent from the whole testimony that the check was merely an accommodation check; a temporary loan of the credit of the bank to Howard for his benefit.

W. F. Furbeck's testimony, record p. 50.

R. J. Well's testimony, record pp. 69 and 69.

C. K. Howard's testimony, record pp. 83 and 88.

The rule is that a corporation cannot, without positive express authority so to do, issue or indorse simple accommodation paper in which it has no interest, and such paper will be void in the hands of persons who have notice of its character.

*Greens Brices Ultra Vires*, p. 252 and Note A, and p. 272 and Note A.

*Bank of Genosee vs. Patchen*, 13 N. Y., 309, 314, 315, 321,

*Farmers' Etc. Bank vs. Butchers' Bank*, 16 N. Y., 125, 128.

*Randolph on Commercial Paper*, Secs.

This principle has been applied to such paper of national banks.

*Brown's National Bank Cases*, p. 203, 105.

*Ball on National Banks*, p. 54.

*Johnston vs. Charlottsville Nat. Bank*, 3 Hughes, 657.

This check was not issued by authority of directors of the bank, nor was its issue ever authorized by them.

Furbeck's testimony, record p. 51.

Schaetzel's testimony, record p. 64.

And it is the general rule that, "No officer of a bank can bind it by a promise to pay a debt which the corporation does not owe and was not liable to pay, unless the bank authorizes or has ratified it."

*Rich vs. State National Bank*, 7 Neb. 201.

*Merchants Bank vs. Marine Bank*, 3 Gill, 97.

*Salem Bank vs. Gloucester Bank*, 17 Mass. 1.

We think it must appear from what we have here cited from the testimony in the record that there was evidence which should have been submitted to the jury tending to show that the County Commissioners had taken no action whereby the County could be predjudiced until after full notice of the dishonor and invalidity of the check; and also that the Commissioners' and the Treasurer's sureties acted in bad faith toward the defendant Bank in taking possession of the check and placing it for deposit with the plaintiff Bank; and also that the plaintiff had knowledge even before the check was deposited of its accommodation character and of its invalidity.

ESTOPPEL.

The Court took a view of this case that rendered all the matters of defence we have urged unavailable

and has maintained that defendant Bank is estopped from making a defense because "the check upon the delivery to Howard became the property of the County" and "if the check was issued illegitimately the defendant is in no position to defend against it." We think this position is not sustained either in principle or by authority. If the check springs from an illegal transaction or is given for an unlawful purpose payment of it cannot be enforced and the defendant is not estopped from making the defense against the payee or anyone taking from him with notice.

"No right of action can spring out of an illegal contract."

"When each party is in fault the law favors him who defends."

One of the defenses set up is that the check was obtained by fraud and the testimony of witness Wells tends also to show that it was illegally issued.

"A court of equity will not interfere to give relief to either party from the consequences of such an agreement." It is against the policy of the law to enable either party in controversies between themselves to enforce an agreement in fraud of the law, or which was made to injure another."

*Randall vs. Howard*, 67 U. S., 585, and cases cited.

*Toler vs. Armstrong*, 11th Wheaton, 259.

*Brown vs. Tarkington*, 3 Wall, 377.

*Coppell vs. Hall*, 7th Wall, 542.

*Collins vs. Blantern*, 1st Smith's Meading cases, 254.

The principle we contend for has been often applied by the Courts to cases of fraud attempted to be practiced upon creditors and there the decision has been founded upon the distinction between executed and executory

contracts the rule established by the great weight of authority is that Courts will not aid either party in enforcing an illegal executory contract or one which is tainted with fraud and if executed will not aid either party in setting it aside or recovering back what has passed under. This contract is clearly executory.

The plaintiff is endeavoring to enforce payment, and stands, as we have shown, in the shoes of Howard. The defendant asks to be let alone. The law favors him who defends.

*McCausland vs. Ralston*, 12 Nev., 195.
*Mosely vs. Mosely*, 15 N. Y., 334.
*Nellis vs. Clark*, 20 Wend., 32.
*Hamilton vs. Sculls, Mrs. A.*, 23 Mo., 166.
*Goudy vs. Gebbhard*, 1 Ohio St., 263.
*Bradford vs. Beyer.*, 17 Ohio St., 388.

This case, by the testimony of Witness Wells, is brought directly within the provisions of the Dakota Statute.

Compiled Laws, Sec. 3577.

"That is not lawful which is:

"1. Contrary to an express provision of law;

"2. Contrary to the policy of express law, though "not expressly prohibited; or

"3. Otherwise contrary to good morals."

Sec. 3578. All contracts which have for their object directly or indirectly to exempt anyone from responsibility for his own fraud * * * are against the policy of the law.

If the check was given without consideration and to enable Howard to deceive the County Commissioners as to his defalcation, then the transaction was unlawful, and neither Howard or anyone but an innocent purchaser without notice can recover upon it.

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If the check was given without consideration and to enable Howard to deceive the County Commissioners as to his defalcation, then the transaction was unlawful, and neither Howard or anyone but an innocent purchaser without notice can recover upon it.

The vital elements of an estoppel *in pais* are wanting. If the estoppel is supposed to arise from the check itself, the answer is that no one could avail himself of it, except one who would be protected without it, as an innocent purchaser for value.

This check is not a certified check, but more nearly corresponds to a promissory note of the bank. It is not a representation in any sense. From it, it is not to be inferred that Howard, the payee, had any money in the bank, or that it was drawn against any fund of his in the bank; and it is well settled that to estop the parties to a bill of exchange, their representations as to its consideration and validity must be *outside the face of the bill.*

*Clark vs. Sisson*, 22 N. Y., 312.

Nor does the statement of the officers of the bank, (Record p. 57), which was taken to the commissioners before the check was issued, operate as an estoppel.

*First.* Because if the representation was true in spirit and in letter, the deposit would not, without the delivery of his own check by Howard upon the deposit, furnish consideration for the cashier's check.

*Second.* The amount of the deposit which the bank might be estopped to deny, is not as large as the amount of the cashier's check by nearly $1,000, and consequently the defences pleaded by defendant are available notwithstanding the estoppel.

*Third.* Because the following essential features of an estoppel *in pais* are wanting:

(a) There can be no estoppel against showing an act made void by statute. (Bigelow on estoppel, 4th ed., 544.)

(b) Where the conduct supposed to have created an estoppel was caused or directly encouraged by the party alleging the estoppel, none is created. (Bigelow on estoppel, 563.)

*Gallagher vs. People*, 91 Ill., 582.

(c) Only the person to whom the statement was made, or for whom it was designed, can avail himself of it as an estoppel. (Bigelow on estoppel, 611, 619, 576.)

*Mayenberg vs. Haynes*, 50 N. Y., 675.
*Kenney vs. Whiton*, 26 Am. Rep., 462.

(d) And the party alleging the estoppel must have been misled to his prejudice. (Bigelow on estoppel, 628.)

*Ketchum vs. Duncan*, 96 U. S., 659.

(e) And must have been so misled *relying* upon the statement.

*Andrews vs. Ætna Life Ins. Co.*, 85 N. Y., 344.
*Wilcox vs. Howell*, 44 N. Y., 398.

(f) The estoppel, if there be eny, connot be taken advantage of by one who knows of the fraud or illegality.

(g) If the paper is accommodation paper, which the bank had no authority to issue, there can be no estoppel, unless the bank received the proceeds and retained them.

*Franklin City vs. Lewiston Savings Institution*, 68 Me., 43.

(h) Even if the check were a certified check, no estoppel would arise therefrom, if the certification were corrected or the check revoked before anyone had been misled thereby to their prejudice.

Bigelow on estoppel 517.

*Irving Bank vs. Wetherald*, 36 N. Y., 335.

Morse on Banking, 302.

*Second National Bank vs. Western National Bank*, 34 Am. Rep., 300.

Bigelow on Estoppel p. 552.

Now it is plain from the evidence, not only that the check was void under Section the 3578 referred to,

but the statement was also void and unauthorized. So, if as we claim, the Commissioners participated in or encouraged the procurement of the check, no estoppel is created against the defendant.

Again, the estoppel arising from the statement cannot avail the plaintiff, because it was not made to or designed for the plaintiff.

Nor can it be said, that the plaintiff was misled by the statement, Exhibit B, never having seen it, nor that the Commissioners were misled, because as it appears, they not only refused to act upon it, but took no proceeding, as to the settlement of the Treasurer's account, until six days after the statement was presented, when they were fully appraised, not only of the defalcation of the Treasurer, but of the invalidity of the check.

Again, if the Commissioners knew of the fraud or illegality, as we have seen they did, they are not in a position to allege an estoppel, and the plaintiff having taken with notice, is in no better position than are the Commissioners. If a bank may, after certifying a check, change or revoke its certification before any innocent party has been misled thereby, with how much greater force, may we argue, that a bank may cancel its paper fradulently obtained by it, but which contains no representation, before any third person has been injured thereby.

Moreover, st has been decided by this Court that an estoppel, *in pias*, to be available must have been pleaded where there was opportunity to plead it.

*Parliman vs. Young*, 2 Dak. 175, 4 N. W. Rep. 143

If the plaintiff is an endorsee of the check in due course, its recovery is governed by the general principles applicable to negotiable paper, and it does not re-

quire the aid of any estoppel. On the other hand, if the plaintiff is not an endorsee in due course, it is not in a position to assert an estoppel.

It should have been left to the jury to decide as to the matters of fact concerning the estoppel with instructions from the Court as to the law upon this point.

*Merchants' National Bank vs. State Bank*, 10 Wall, 604, or Thompson's Cases, 60.

*U. S. vs. Bk. Columbus*, 61 How., 132, L. C. Ed.

To make the acts of Furbeck as cashier in issuing and delivering the check in suit, binding upon the bank, two things must appear:

*First.* That the acts were within the scope of his inherent authority.

*Second.* That the act must also have been within the corporate powers of the bank.

Or it must appear that the check passed into the hands of an endorsee in due course as defined by the statute.

Of course it was in the power of Furbeck, as cashier, to issue and deliver a cashier's check, if it were done in the discharge of his ordinary duties, but no combination or arrangement of the facts in the case will enable us to bring this transaction within the powers which Furbeck possessed as cashier. The whole business was beyond the scope of his authority.

To give Howard that large sum of money on the best of security would have been a loan in excess of the amount allowed by the National Bank act, ($5,000), and to let Howard have the check in suit without consideration, and on the terms agreed upon between him and Furbeck was most certainly outside the cashier's authority. If, as the plaintiff has sought to establish, there was an agreement between Howard and the offi-

cers, Wells and Furbeck, to deceive the Commissioners by the use of this check as to the true status of Howard's accounts then there can no be preetense that it was within the authority of these officers to bind the bank thereby.

*Norton vs. Derby, National* Bank, 60 Am. Rep., 336.
*United States vs. City Bank*, Columbus.
*U. S. vs. Dunn*, 6th Pet.. 51.
*Norton vs. Derby Nat. Bank*, 60 Am. Rep., 589.
*Marsh vs. Fulton Co.*, 10th Wall, 1041.
*Sandy River* Banks *vs. Merchants' Bank*, 1 Biss., 146.
*Foster vs. Essex Bank*, 17 Mass., 479.
*Mapes vs. Bank*, 80 Pa. St., 165.
*Cooke vs. State Nat. Bank*, 52 N. Y., 115.
*First Nat. Bank vs. Drake*, 57 Am. Rep., 193.
*Wiley vs. Bank*, Thompson's Cases, 905.
*Johnston Bros. vs. Charlottesville Nat. Bank*, 3 Hughes, 657.
*Segilman vs. Same*, 3 Hughes, 647.

Finally, to conclude, we maintain, (1) that the plaintiff, the Sioux Falls National Bank, being as we have shown entitled to recover against defendant bank upon the check only as a *bona fide* holder and purchaser of the same without notice, not only at the time of receiving the check on deposit, but at the time of paying out the money on account of that deposit, there was a question of fact made upon the issue that it was the province of a jury to determine; (2) that plaintiff was not the real party in interest and the owner of the check but was a mere bailee for Howard, because by the resolution of the Commissioners the check was taken from Howard, against his will, and he was first required to endorse it, the bondsmen were then put in charge of Howard's

office and his effects, and the bondsmen were also by resolution of Commissioners required to deposit the check as the "funds of Minnehaha County," and they did so not endorsing the check. By all these proceedings the title did not change from Howard, otherwise if this be not true the whole transaction was the result of the conspiracy charged in defendant's answer and the result is the same as to ownership of the check.

The several issues, presented by defendant's pleadings and the evidence submitted in support thereof raised questions of fact that should have been submitted to the jury, and the directed verdict was erroneous.

Respectfully submitted,

W. A. WILKES,
F. L. BOYCE.

Attorneys for Defendant in Error, the First National Bank.

R. J. Wells.

150 U.S. 231

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# CASE No. 13915.

# Supreme Court of the United States.

**OCTOBER TERM, 1893.**

*Term No. 53.*

J. LESLIE THOMPSON, RECEIVER, &C., ET AL.,
PLAINTIFFS IN ERROR,

*vs.*

THE SIOUX FALLS NATIONAL BANK OF SIOUX FALLS, DAK.

## BRIEF FOR THE DEFENDANT IN ERROR.

GEORGE A. MADILL,
*Of Counsel for Defendant in Error.*

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

# CASE No. 13,915.

IN THE

## SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1893.**

TERM No., 53.

J. LESLIE THOMPSON, AS RECEIVER OF THE FIRST NATIONAL BANK OF SIOUX FALLS, DAKOTA, AND THE FIRST NATIONAL BANK OF SIOUX FALLS, DAKOTA, PLAINTIFFS IN ERROR,

*vs.*

THE SIOUX FALLS NATIONAL BANK OF SIOUX FALLS, DAKOTA, DEFENDANT IN ERROR.

### Statement.

This action was commenced in the district court for the county of Minnehaha, Territory of Dakota, on the 14th day of January, 1886, the writ of summons being served on that day. The answer of the defendant was filed on the 15th day of March following. The defendant in error was the plaintiff and the plaintiff in error, The First National Bank of Sioux Falls, was the sole defendant.

The complaint (R., 30, 31,) alleged that the plaintiff and defendant respectively were corporations under the national banking act and located at Sioux Falls, Dakota; that (article three of the complaint) on January 12th, 1886, at the city of Sioux Falls, said defendant, by W. F. Furbeck, its cashier, for value received, made its check in writing, dated on that day, and delivered it to C. K. Howard, said check being in the words and figures following:

"No. 91. SIOUX FALLS, DAK., *January* 12, 1886.

"The First National Bank of Sioux Falls pay to the order of C. K. Howard, Co. treas., sixteen thousand five hundred and seventy-one and $\frac{61}{100}$ dollars ($16,571.61).

(Signed) "W. F. FURBECK, *Cashier*."

That said Furbeck was cashier of said defendant and issued the check for and in its behalf, said check having the words "cashier's check" printed across its face; that said C. K. Howard duly endorsed said check, writing across the back thereof "C. K. Howard, county treasurer," and delivered the same so endorsed, and that afterwards, on January 13th, 1886, it came lawfully into the possession of the plaintiff in the usual course of business, for value, and that plaintiff was the legal owner and holder of it. It was also alleged that the check was duly presented to said defendant for payment on the 13th day of January, 1886, and payment refused, and judgment was asked against the defendant for $16,571.61, with interest from January 13th, 1886, and costs.

On the 1st day of March, 1886, 45 days after the suit was commenced and 14 days before the defendant's answer was filed, an affidavit for an attachment was filed by plaintiff (R., 14, 15, 16) and a writ of attachment issued (R., 18, 19) on the ground, among others, that the defendant had or was about to assign or dispose of its property with intent to defraud its creditors. The attachment was levied on said 1st day of March on certain property (consisting of

money, notes, shares of stock, etc.), which is described in an inventory attached to the return of the sheriff and marked "Inventory A" (R., 19–25). The nominal or inventory value of the property seized by the sheriff amounted to $123,060. Its actual value does not appear. Of this property the sheriff returned or tendered to the defendant on the 5th day of March, 1886, what amounted, at the inventory values, to $95,518.79 (R., 19, 20) and retained property of the nominal or inventory value of $27,541.21, consisting of coin, notes, etc., and described in "Inventory B" (R., 25, 26), and this last-mentioned property was in turn delivered by the sheriff to J. Leslie Thompson, as receiver of the defendant, on the 31st day of March, 1886. (R., 19.)

A motion by defendants to dissolve the attachment, ordered by the court to be heard on March 2d, but continued by it to a later day (R. 26–'7–'8), was heard and overruled on the 9th of March, 1886 (R., 29), and on the 10th of March, 1886, the answer (R., 33–37) of the defendant bank was served on the plaintiff's attorneys and was filed on the 15th of said month (R., 37). It seems to have been framed on the theory of presenting a general denial, qualified by certain admissions, and two affirmative defences.

By the first paragraph of the answer the defendant admits the incorporation and location of the plaintiff and defendant as alleged in the complaint, and also contains the following specific admission: "That on the 12th day of January, 1886, W. F. Furbeck, the cashier of defendant, made a check payable to the order of C. K. Howard, county treasurer, for the sum of $16,571.61; that a correct copy of said check is set forth in article 3 of plaintiff's complaint; that said check is endorsed across the face, "cashier's check," as alleged, and that said check has not been paid by defendant." And then follows a denial of all the remaining averments of the petition.

By the second paragraph of the answer the defendant denied "that the check mentioned in the complaint came law-

fully into the possession of the plaintiff in the usual course of business," and averred that "the acquisition or purchase of said check by plaintiff was an act *ultra vires* of said plaintiff, and no action can be maintained by plaintiff thereon."

The substance of the third paragraph of said answer, stated to be "a further defense," is as follows:

(*a*) That the check described in the complaint "was never absolutely delivered to the payee therein, so as to become a valid obligation against defendant, but was delivered conditionally and not otherwise, as hereinafter set forth."

(*b*) That the said "C. K. Howard, as county treasurer of the county of Minnehaha," kept an account for and on behalf of said county with defendant, and on the 12th day of January, 1886, as county treasurer, applied to defendant for $16,571.61, but that "the credit to said Howard's account on the books of the bank was not at that time equal to the sum requested."

(*c*) "That while the check set up in the complaint *was* "*issued* it was not delivered as an obligation of the bank to "C. K. Howard and the transaction was not complete; that "while the said Howard took said check into his possession "he did so upon the express condition that he would at "once make further deposits with the bank; that his ac-"counts should be made good for the amount of the check, "and that the check should not be treated as delivered and "operative, and should not be by him disposed of, hypothe-"cated, or put in circulation before said account was made "good and consideration furnished for said check and said "transaction fully completed; that said Howard's account "was never made good to the amount of said check; that "said Howard never gave his own check *upon his deposit* "for the amount of said check nor did said Howard (the "conditions of its delivery failing) return said check to de-"fendant in pursuance of his agreement aforesaid."

(*d*) That said Howard was at said time "about having his "January settlement as treasurer with the board of County

"Commissioners of Minnehaha county and" produced said check, together with certain moneys before said commissioners on accounting had with them concerning the county business and that "thereupon the said commis- "sioners wrongfully and illegally took from the possession "of said Howard the said check" and turned it over to "H. "L. Hollister, C. G. Coates, and W. H. Corson who, with "D. R. Bailey," wrongfully and illegally received it and offered it to the Dakota National bank for deposit, whose president and said D. R. Bailey duly presented it to the defendant for payment which was "refused because said check was obtained without consideration "and conditionally as aforesaid and was not a valid ob- "ligation of defendant; that thereupon the said Dakota "National bank refused to receive said check upon deposit," whereupon and some hours thereafter, as defendant is informed and believes, said Bailey, Coates, Hollister, and Corson took said check to the said plaintiff which, "with "full knowledge of the dishonor of said check," took it and credited it to a new account with plaintiff in the name of said Hollister, Coates, and Corson; that plaintiff paid no money on account of the check, but gave said parties "a "bank pass book of account" showing a credit for said check; that plaintiff "at once presented said check for payment to defendant and the defendant explained said matter of the issuance of the check to plaintiff and refused payment thereof and notified plaintiff that said check was not a valid obligation of defendant and requested plaintiff to deliver it to said parties from whom it received it, but plaintiff refused so to do, although at the same time admitting that "no payment of money or otherwise" had been made on account of said check.

(c) That said County Commissioners "were notified *on the* "*13th day of January*, 1886, of the facts herein set forth con- "cerning the issuance of the check and of the fact that it "was not a valid obligation of defendant several days before

"making their settlement and approval of the accounts of "C. K. Howard, county treasurer;" that neither the said County Commissioners nor said Hollister, Coates, Corson, or Bailey had at any time any property in or title or right to the possession of said check, and that plaintiff took said check in bad faith, with notice of this fact and of its dishonor, and that it was not a valid obligation of defendant and paid nothing for it until after it had full knowledge of the facts set forth concerning said check and of the fraud practised upon defendant in transferring it.

By the fourth and last paragraph of the answer an additional defense is alleged to be pleaded. And after stating that Howard was at the dates mentioned in such defense, and for many years had been county treasurer of Minnehaha county, and was on the 12th of January, 1886, about to have his semi-annual accounting and settlement with the County Commissioners of said county, it avers that he was at the time "in arrears in a large amount to "said county and without sufficient funds to meet his "obligations to said county." That Howard received the check from Furbeck (defendant's cashier) conditionally and in his official capacity as treasurer of said county. That the funds then to the credit of the official account of Howard in the defendant bank "were not equal to "the amount of said check, and thereupon it was agreed "by said Howard that he would at once bring in money "enough and make a deposit so that said account should be "good as against said check, and that the said check should "not be put into circulation as an obligation of defendant "until said transaction was fully completed; that said "Howard neither then nor thereafter gave his check upon "his said official account to cover the said Furbeck's check, "nor did he bring in moneys to make said account good as "against said check, and obtained conditional possession of "the same without any consideration whatsoever;" that said Howard, after obtaining said check, presented it to said

Board of County Commissioners, but that it was not then endorsed by him nor did said Commissioners then make any settlement with him of his said official accounts or any order that said accounts were found to be correct, or that Howard had produced before them moneys and vouchers to cover the funds chargeable to him as treasurer of said county. That before the making of any such settlement defendant gave notice to said Board of Commissioners of its intention to resist the collection of said check and that it had a good defense thereto, and stated the grounds thereof as aforesaid.

It then proceeds to allege that at date of said check J. B. Young, H. L. Hollister, Clark G. Coates, and W. H. Corson were and for many years prior thereto had been sureties of said Howard on his official bond as treasurer of said county, and that prior to the presentment of the check to said Board of Commissioners, and on or about the same day, said Hollister, Coates, and Corson had applied to said board to be released from said bond and that said application was refused."

Then follows an averment of a combination and conspiracy by and between said Hollister, Coates, Corson, and Howard on or about the 12th of January, 1886, and before the issue of the check by the defendant, to obtain from the defendant the amount of said check and thus enable Howard to make good his default to the county; that in pursuance of said conspiracy Howard obtained said check from the defendant, it being at the time ignorant of such conspiracy and reposing in the confidence that Howard was acting in good faith with it and that the representations and promises made it by him and the conditions aforesaid upon which the check was delivered to him would be fulfilled; that Howard and his sureties, in furtherance of said conspiracy and to consummate the fraud intended, procured the Board of County Commissioners to aid by unlawfully taking possession of said check "and turning the same into the possession of said Hollister, Coates, and Corson;" that in order

to further and more fully consummate said conspiracy the check was indorsed in blank by Howard so as to render it negotiable, and the said sureties, having it in their possession, endeavored to negotiate it to an innocent purchaser, failing in which they deposited it in the plaintiff to their own credit instead of to the credit of the county, as enjoined and required to do by the Board of County Commissioners; that the plaintiff before and at the time it received the check had notice of all the facts aforesaid and that the check had been dishonored and aided in the consummation of said conspiracy, and in pursuance thereof "presented said check to defendant for payment on the same day on which it received it from said sureties;" that plaintiff, though then informed by defendant of all the facts, refused to charge the check back to the depositors of it, as requested by defendant, and on the following day commenced this action, prior to which and to full notice of the facts concerning the check plaintiff had not paid anything for said check, and that for any apparent payment on the check made by plaintiff after notice of the facts aforesaid it was "protected by the obligation or agreement of said sureties on said Howard's bond." Then follows a demand by defendant for judgment for its costs.

To this answer the plaintiff filed a reply on the 24th of March, 1886, by which it admitted that C. K. Howard was treasurer of Minnehaha county on the 12th of January, 1886, and had been for a number of years, and that on or about said 12th day of January he had his semi-annual accounting and settlement of his accounts with said county up to said January 1, 1886, and that prior to said date he kept, as county treasurer, an account with the defendant. Except said admissions all the new matter alleged in the various paragraphs of the answer was denied and judgment demanded as in the complaint. (R., 38.)

On the 11th day of March, 1886, the Comptroller of the Currency appointed J. Leslie Thompson, one of the plain-

tiffs in error, receiver of the defendant bank (R., 45); and on the 7th day of December, 1886, the case was removed by change of venue (granted on the application of the defendant) to Moody county (R., 30). On the 29th day of December, 1886, the receiver presented his petition, dated December 26, 1886, to the district court for Minnehaha county, asking to be substituted as defendant in the place of the First National Bank of Sioux Falls, Dakota, and that said action be continued in his name, and that he be allowed time to prepare an amended answer (R., 44–5–6). Upon this petition the district court, by its order made or filed (R., 46–47) January 26, 1887, directed that said Thompson be made an additional party defendant, and gave him leave to amend "the "answer of the defendant bank in such other respects as "he may be advised, * * * and that the cause there-"upon proceed in like manner as if said petitioner had "originally been a party thereto." Thompson excepted to the action of the court in refusing to substitute him as sole defendant in the cause. (R., 47.)

On the 11th day of April, 1887 (about fifteen months after the commencement of the suit), the receiver, as a defendant in the case, filed his answer to the complaint (R., 39–43). By the first paragraph his appointment as receiver on March 11, 1886, of the defendant bank is alleged. The remainder of his answer is substantially a copy, including admissions, of the answer filed over a year before by the defendant bank.

The case was tried in June, 1887, in Moody county (to which it had been removed by change of venue taken by defendant in December, 1886) before Judge James Spencer and a jury (R., 47), and resulted in the court directing, at the conclusion of the testimony of both sides, a verdict and judgment for the plaintiff for $18,247.14. (R., 107.)

The defendants filed a joint motion for a new trial (R., 108–149), which being heard and overruled on the 13th day of April, 1888 (R., 154–5), they prosecuted an appeal to the

supreme court of the Territory, where the judgment was affirmed.

The evidence introduced at the trial was voluminous, but, inasmuch as the plaintiffs in error insist that the case should have been submitted to the jury, the substance of it will be fully stated, arranged, so far as practicable, in the order of the events to which it refers rather than the order of its introduction at the trial. The objections of counsel and the rulings of the court in respect of the admission or exclusion of evidence will be omitted for the reason that if the trial court was right in directing a verdict for the plaintiff, then there were no rulings made as to the admission of testimony which could affect the correctness of such direction.

The deposition of C. K. HOWARD was read, a part of it by defendants and the remainder by plaintiff in rebuttal. The following is the substance of it:

He testified that he had been county treasurer of Minnehaha county for a number of years and kept his deposits as such treasurer with the defendant bank from the time of its organization. In January, 1886, R. G. Wells was its president and Warren F. Furbeck its cashier, and Howard's semi-annual settlement with the County Commissioners was entered upon on the 12th of January, 1886 (R., 86). Howard had made an arrangement with the officers of the defendant bank to furnish him funds to make his settlement with the Board of County Commissioners in January (R., 86). He stated that (R., 86–7) for a number of years he had been somewhat mutually interested with that bank in different enterprises, and it was the understanding with the old management—Young as president and Hollister as cashier—that they were to sustain him in the business in which he was interested and in some matters in which he and they were mutually interested; and when he learned of Young's retirement from the active management of the bank he went to him and asked if it was going to

make any difference with his being sustained there as he had been theretofore, by which he referred to his county treasurership, and also to general business matters in which they were mutually interested. He told Young that he understood he was going away, and that if he went without leaving any explanation of the matter it would place him (Howard) in a very unfortunate condition, and he wanted to know definitely what he could depend on; that Young stated to him that, while his family was going to California, he did not expect to leave himself, and that he had talked with the management as it then existed and had made such arrangements that Howard would be protected (R., 87). Witness asked Wells (who became president of the bank in the early part of December, 1885, R., 68), if Young had talked with him about his (Howard's) matters, and he replied that he had, and that they would help him out. This was a few days before Howard's settlement and he had talked with Wells about the settlement. Nothing particular was said about the settlement any more than that they were to assist him in it. He thought Mr. Furbeck (cashier of the bank) was there; thought he talked to Wells and Furbeck together about it, and he also talked with them separately about it; told them he thought it would take about $15,000 to make his January settlement with the County Commissioners. His recollection was that he talked with both Wells and Furbeck about it and they carried the idea that they would help him out (R., 88). He asked Furbeck what would be necessary for him to obtain the proper credit to show the Commissioners, and his recollection was that he proposed to Furbeck to give a note for the amount; that Furbeck said it would be better for him (Howard) to make some drafts to cover that much credit; that he (Howard) had considerable business transactions with M. D. Steevers & Co., of Chicago, and had very frequently made drafts on them which had been honored. Furbeck suggested to him that he make drafts on Steevers to cover the

amount, and he (Howard) told him he could make the drafts, but had not the proper credit there to obtain payment of them. But Furbeck said that he would place his books in proper shape and he would charge it back to him (Howard) in time; wanted to have the matter in a business-like way, show a business-like transaction, and keep his books straight. Witness thought it was just a matter of opinion whether these drafts would have been returned in the usual course of business before the time for him to make his settlement with the County Commissioners; that he could not positively state as to whether they would or not, but thought they would not have reached here in time; that this conversation occurred a few days prior to his January settlement with the Commissioners. He made the drafts, and his recollection was that one of them was for $6,000, another $4,000, and another $5,000. His recollection was, but he was not positive, that he made the drafts on separate days. After making them he deposited them in the defendant bank to the credit of "Minnehaha county, C. K. Koward, county treasurer," that being the way he had kept his account in the bank. (R., 88.)

That (R., 89) at his settlement with the Commissioners in January, 1886, he appeared before the board with his books and vouchers and settled. There was a balance due the county up to the 1st of January of about $27,000. He had in his hands several thousand dollars which he afterwards turned in; had cash on had for the amount due the county less some $15,000 or $16,000. He had this money before the Board of County Commissioners. He had money in connection with his bank book; that his bank book was written up in the bank by some of the officers and handed to him by some of the officers, he thought Mr. Furbeck or some of the clerks. He exhibited the bank book to the Commissioners, and they said no doubt it was all proper, but they would like to have some "little further assurance that he had the stuff—the money" (R., 89). He then went

down to the bank and told Mr. Wells and Mr. Furbeck that his settlement was all satisfactory and his books all checked up, and everything was perfectly satisfactory so far as the settlement was concerned except the fact that the Commissioners wanted more conclusive evidence that he had that much money; that his recollection was that Mr. Wells gave him a letter and made a statement to the board to the effect that the books of the bank showed that he (Howard) had, as county treasurer, a credit to Minnehaha county of so much money, $15,000 or $16,000; that he handed this statement given him by Mr. Wells, the president of the bank, to the Commissioners. He did not know what became of it. His recollection was that they said that "it was getting a little nearer bed-rock, but they would like a certified check." He then went to the bank and got a check (the check was identified and is the one set forth in the plaintiff's complaint). The witness did not remember all that was said between Mr. Wells and Mr. Furbeck and himself with reference to the check when he got it (R., 90). As near (R., 91) as he could remember what was said was this: "There was a check that "they thought would answer my purpose and would aid "me, assist or sustain me in perfecting a settlement with "the board. I told Mr. Wells and Mr. Furbeck that the "County Commissioners requested of me a certified check." He identified the check and said that it was his signature on the back of it and that it was his own handwriting; that it was his endorsement. When he received the check from the First National bank he turned it over in settlement to the Commissioners, enough to make with the currency $27,000, as near as he could remember, to the Board of County Commissioners of Minnehaha County. They were in session at that time. It was their semi-annual meeting. The check was counted with the funds he had on hand to make the required amount which he needed to make settlement with the county.

On cross-examination (R., 82) (which was read in evi-

dence first by the defendants) he testified that his recollection was that he went to the defendant bank during banking hours and got the check, but was not positive; that it was his impression it was delivered to him late in the day. He had several consultations with both Wells and Furbeck in regard to the matter, talked with both of them at different times, and at the time he got the check had conversation with both of them. Mr. Furbeck delivered the check to him. Witness wanted to get the money instead of the check and said to them, "Of course, if I take the money "and that was counted that would be the end of it." That there was some talk about money, but he could not exactly remember it. But he knew there was talk about money and remembered Mr. Wells saying that they had the money to give him to make his settlement, but why it was not furnished (R., 83) him and why he took the check he did not remember, but he said to Mr. Wells that the Commissioners wanted a certified check. He then went to Furbeck and stated to him that a certified check was all that was necessary to accomplish the settlement, but was told by him that they did not issue certified checks, but that a cashier's check would be given him. His recollection was that the transaction was quite late in the day. He first appeared before the board with the bank book and afterwards appeared with a letter from the president of the bank, and his recollection was that this last transaction was quite late in the day. He could not state positively the time Furbeck handed him the check, but he went direct from him to the Board of County Commissioners. When he received the check he told Furbeck, as near as he could remember, that if they allowed him to straighten up everything he would deposit the check and the currency in the morning, referring to the money that he had on hand in his private box in the vault in the treasurer's office; told Furbeck that no doubt that would complete his settlement, and as soon as he had perfected a set-

tlement he would return the check and place to the credit of the county what money he had in his possession, some $12,000 or $14,000; that it was the understanding that the check was not given him to be treated as a valid and binding obligation against the defendant, but was simply loaned to him and a credit of the bank; that the understanding between him and Furbeck was that he was to return the check in the morning and was to deposit to the credit of the county the money in his possession belonging to the county; remembered that he assured Furbeck when he took the check that "it would be a very temporary transaction;" that he would return the check in twenty minutes; that he would be back in the evening. The money he was going to deposit was money he had in his office, an additional deposit. Told Furbeck he had about $14,000—$12,000 or $14,000—which he would deposit in the morning as soon as the settlement was perfected. The understanding was that he was to return the check, and would have done so had everything gone through as he expected. He did not give his check upon the bank for the amount of the cashier's check, but went from the bank to the Commissioners with the check, the entire board being there and in session. He remembered seeing Mr. Bailey, Mr. Hollister, and Mr. Coates there, and they appeared there frequently after (R., 84) his appearance before the board, and they had been there several times previous to the delivery of the check during the day preceding. The meeting was a public one and a public matter, an open session of the board, and parties were out and in frequently. He handed the check to the chairman of the board, and endorsed it that evening after the chairman and the board had examined it. He endorsed the check at the suggestion of Mr. Wright or Commissioner Jones. He added: "I did not take the "check back to Mr. Furbeck as was agreed upon. The rea- "son was that the other fellows were a little stouter than I "was, and they took it away from me. By the other fel-

"lows I mean the Commissioners and my bondsmen. My "bondsmen appeared before the board through their attor- "ney, Mr. Bailey, and made some kind of a demand, I do "not remember just exactly what, claiming that a settle- "ment had been perfected, the funds of the county had been "turned over as per our settlement, and they demanded a re- "lease from any further action upon my bond, and upon "this demand, the statement being made by my bondsmen "through their attorney, the board took possession of the "stuff and deferred action until the next morning. This "occurred the evening that I brought the check to the "Commissioners. I cannot state positively as to whether "the check had been endorsed or not when that demand "was made by my bondsmen. Q. Then, I understand you, "the Commissioners to whom you delivered the check re- "fused to give it back again to you. They were the par- "ties to whom you refer as being stouter? A. Well, that "was, perhaps, a rather broad way of stating it. They took "possession of my funds, papers, and effects pertaining to "the settlement which were then presented."

"My bondsmen appeared before the board through their "attorney and demanded or asked for a release or with- "drawal from my bond. The Commissioners did not give "the check and money back to me. I have never had it "since. They did not take possession of it with my con- "sent. The check was endorsed that evening. My bonds- "men, at the time they made this demand, set up largely in "excuse for their action that Mr. Young, who was one of my "principal bondsmen—either the next day or the day fol- "lowing I tendered my resignation as county treasurer. "I said to them, of course, if they proposed (R., 85) to run "the thing, why I did not know as they needed any fifth "wheel to the wagon. I was present before the Commis- "sioners when they took action turning this check over to "my bondsmen." But he said he was not positive whether this action of the Commissioners was the day following or

the day after that, but his recollection was that it was the morning following the transaction; that the transaction was quite late in the afternoon; that he had been busy all day with his settlement and had first appeared before the board with his bank book and afterwards with the letter from the president of the bank, and his recollection was that this last transaction was quite late in the day, but he could not state positively as to the time.

R. J. WELLS, called by defendants, testified (R., 68) that he was an attorney and the president of the defendant bank in January, 1886, having been elected the first part of December, 1885. (He was a member of the board of directors prior to that time, R., 49.) He stated that the first he saw the check, "to see and to know what it was, was in the fore-"noon of January 13, 1886. I saw it as a piece of paper "once before that. I saw C. K. Howard have it in the even-"ing of January 12, in the First National bank. It was "after banking hours. I am not certain as to the time of "day, but think it was along toward night. Mr. Howard "came into the office of the First National bank late in the "afternoon or the evening (R., 69) of the 12th of January, "about the time I was going home, and wanted something "to help him in his settlement with the county. At that "time this check was given to him by the cashier upon his "repeated assertions and promises that he would keep this "in his own possession and deliver it to nobody, and that "he would return it within a short time—I think twenty "minutes—and that he would also at that time bring in a "large amount of money that he had. He gave nothing "for it and carried it off. He didn't give it back."

He further stated that the check was not charged to Howard in any way. He next saw it in the forenoon of the following day, when it was presented by the Dakota National bank for payment, which was refused. In the afternoon of the same day—the 13th—the president of the

defendant presented it for payment, which was refused, and the same afternoon the cashier of the plaintiff presented it, and payment was again refused. On the afternoon of the 13th of March he, with Mr. Wilkes, had an interview with the president and cashier of the plaintiff, and also with Mr. Keith, its attorney, and informed them that the check had been obtained from his bank without consideration and fraudulently diverted from the purpose for which it was issued, and that the plaintiff had better charge it back to the party from whom it got it; that plaintiff's said officers admitted that they paid nothing for it, but said that "was not the way of doing things, and they proposed to make us pay it." Plaintiffs' cashier said they knew a way to make defendant pay it, and that mighty quick, too, and its president also stated that it would not be charged back, and appealed to Mr. Keith, who asserted as a legal proposition that he could not charge it back. Mr. Peck and Mr. Furbeck also came into the interview. (R., 69, 70.)

On cross-examination this witness said (R., 70, 71): "I "propose to tell the truth and the whole truth about it, if "that is what they want, and let it hurt whom it may. Mr. "Howard came into the bank and wanted some help to "make the settlement with the County Commissioners, and "he stated at that time he was behind considerably. I had "not known before how much it was, and he came down to "the bank with tears in his eyes and said that the peniten-"tiary was staring him in the face, and that he had to have "some help. I proposed to let him have some money to "help him out. He said he had available assets that he "could realize on in the next six months and make him "square with the county. I believed it, and I don't know "to-day but he would have if he had been let alone. "Against my judgment I consented to help Mr. Howard to "keep out of the penitentiary, because any man who lives "in that county knows how Mr. Howard got in this condi-"tion, and it was not through any fault of his own, and I

"felt as though I would like to help him, and proposed to "give him money to carry him over temporarily, to help "him make his settlement with the County Commissioners. "That is all there is in it. My judgment was overruled on "the matter, and this check was issued and he carried it off. "The Court: The check was issued in place of money? "Witness: No, sir; he had no money there to amount to "anything. My proposition was to let him have money as "a matter of accommodation to him. The Court: Finally, "instead of letting him have money, you let him have this "check? Witness: That is about the way of it; yes, sir."

He also stated that the check was given to Howard for the purpose of settling with the County Commissioners; that his purpose was to help Howard; that Howard asked for a certified check, but was refused, and this (R., 72) one was given, but witness did not think it was the same transaction.

Mr. Warren F. Furbeck, called by the defendants (R., 49), testified that in January, 1886, he lived in Sioux Falls and was cashier of the defendant bank, and that Howard, whom he had known since January, 1885, came into the bank and got the check in suit on the day it bears date about half past four in the afternoon, after banking hours, and witness delivered the check to him (R., 49); that the defendant bank (R., 50) received no money, simply a promise of money; that Howard said when he asked for the check that he would within twenty minutes bring in money enough to make a deposit; he would return the check within twenty minutes and would not allow it to go out of his hands and would make a deposit to his credit of a large amount of money besides; that the check was delivered to him on this condition, that he should not allow it to pass out of his hands. He did not return the check, and witness next saw it the following morning when presented for payment by the Dakota National bank. He showed it to Mr. Wells, who

said, "We refuse to pay the check," and handed it back. He had been engaged in the banking business about twenty-five years, at Chicago most of the time, and at Sioux Falls for a year or so; that it was the invariable custom of a depositor to endorse all paper he puts into the bank to his account in any bank witness had ever been connected with; that no action was taken by the directors of the defendant bank with reference to the issuing of this check (R., 51). He was shown the following writing:

"First Nat. Bank, Sioux Falls, Dak., *Jan'y* 12, 1886.

"The books of the bank show a credit in favor of the "county of $15,625.01. If you wish, you have the privilege "of examining the books.

"R. J. Wells, *Pt.*
"W. F. Furbeck, *Cas.*"

The defendant admitted this paper to be a copy of the original made by the president and cashier of the defendant bank and given to Howard. It was read in evidence (R., 51, 52). And the witness said (R., 52) that this letter or statement was given to Howard and that it was written by Mr. Wells, and that witness signed it because it was a statement of the facts in the case; that the books of the bank showed the county had that amount there. Being asked whether it was true, he answered, "Well, under cer-"tain conditions it was; yes, sir;" that it was true at the time the letter was written the county had 15,000-odd dollars to its credit but not subject to check; that it was certainly true that there was that sum of money to its credit, and if it hadn't been true witness would not have made the statement. (R., 52.)

He further stated (R., 52, 53) that Howard, as treasurer of Minnehaha county, kept his account with the defendant bank, and that witness was cashier only about a year, commencing in January, 1885; that Mr. Wells, the president, wrote the statement above set forth, and witness gave it to

Howard, who carried it away and then came back and said he wanted a certified check, repeating it to Mr. Wells in the presence of witness. Witness did not remember whether Howard stated that his account with the county board had been checked up and called for 27,000-odd dollars. He could not swear Howard did not state it, but that he did not recollect; that Howard wanted a certified check or the cash, and witness then issued to him the check in question. He thought Howard wanted to take it to the County Commissioners, but did not remember sufficiently the purpose for which he said he wanted it. He issued the check because Howard requested it, but could not swear that Howard said he wanted the check to settle with the county board, and couldn't say that he did not say he wanted it for that purpose; that he had no conversation with Howard prior to issuing the check in regard to it; that he meant to say that he "had had no conversation whatever with Mr. Howard "about issuing this identical check at any time—that is, "prior to issuing it." (R., 54.)

The following question was asked him (R., 55:) "Q. I "wish you to explain to the jury the answer that you gave "yesterday to this question: 'Was it true that there was "'that amount of money to the credit of the county?' A. "I think I meant to say that the statement that the books "showed that there was this amount to the county's credit was "true; the statement that the books showed it, but not that "it was a fact that the money was there, but that the books "showed it, and that is why I so stated it; the statement "was true that the books showed it."

On cross-examination (R., 55) he said: "Q. Did you testify "yesterday, Mr. Furbeck, that the county had 15,000-odd "dollars to its credit in the First National bank when you "made that statement? A. I did not. Q. You say that "the books of the bank showed that the county had that "credit there, did you not? A. I say that the books showed "it. Q. Were your books false? A. I do not think the

"books were false. If I could give my explanation that "would show conclusively as to it. Q. Who had charge of "those books? A. I do not know who had charge of them "at that time. Q. Did you? A. No, sir; I did not. Q. "You was the cashier of the bank? A. Yes, sir. Q. You "knew what was in the books, didn't you? A. Yes, sir. "Q. You knew what was in those books yourself and that "the county had this credit? A. Yes, sir. Q. Now you "say the county did not have this credit? A. I say they "did not have it subject to check. Q. I am not asking as "to that? A. I said that the books showed that the county "had that Credit. The Court (R., 56) Was it true in fact "that the county had the money there? A. They did not "have the money there; no, sir; not that they could take "out."

PORTER P. PECK (by deposition read by defendants) (R., 72) testified that he was assistant cashier of the defendant bank in January, 1886. The first he knew positively that a check of some $16,000 had been issued to Howard was after it had been refused by the bank, but did not remember what day that was; that about the time the county board was in session Howard was in the office of the bank very often, in there a great deal, was running in and out frequently; thought he was in there on the afternoon of the 12th and when he went out he had something in his hand; could not say what it was, but thought it was a check, and he (Howard) remarked to Mr. Wells and Mr. Furbeck that he would bring it back in twenty minutes; that they seemed to have been charging him about something. Witness assisted in the organization of the Dakota National bank in December, 1883, and was cashier of it up to 1886, and was employed by it from January to March; that on the evening of the day the check was presented to the defendant for payment he and Mr. Wilkes went to the plaintiff's bank and Wilkes requested Mr. McKinney and Mr. Norton, as presi-

dent and cashier of plaintiff, "not to press the First Na-
"tional for the payment of that check, but to charge it back
"to the parties, as it was dishonored for the reason of the
"bank's not having received any value therefor, and in-
"sisted upon their not pressing the payment, but to charge
"it back; that was the burden of the conversation. Mr.
"McKinney said he should insist upon the First National
"folks paying the check."

On cross-examination he said (R., 73) that in the conversation with McKinney, which he thought was on the evening of the 13th of January, the evening the check was dishonored, that he did not know that he had stated to Mr. McKinney on that occasion that if he (witness) had anything to do or say about the check the First National bank would pay it; that he may have stated that, but whether it was on that occasion or not he could not say; that he did not think the conversation became general enough that such statement was made on that occasion, but that he did not deny having made it.

W. A. Wilkes, called by defendants, testified (R., 80, 81) that he resided in Sioux Falls; was a lawyer, and knew of the settlement of Howard as treasurer in January, 1886, and was in the room when the Commissioners met on the evening of the 12th of January, the evening the check was given; that Mr. Phillips, (who was county clerk), and Mr. Wright (who was district attorney of the county), and some of the Commissioners were there, but who he would not attempt to say. The board was not in session. He spoke to Mr. Wright and also to Mr. Phillips. It was very late in the day—almost dark; thought he first called Mr. Wright to him or walked toward him—he was off at one side of the room—and inquired of him concerning the proceedings of the board; stated to him that he understood there was a check that was before the board involving the matter of Howard's settlement, and wanted to notify them

not to take into consideration that check; that the bank would defend against it as in the hands of Howard and refuse payment; that he said substantially the same to Mr. Phillips, the clerk, although not quite so fully as in the talk he had with Mr. Wright, and said nothing else either to Mr. Wright or Mr. Phillips at that time. He went there at the request of Mr. Wells, the president of the First National bank; was there the next day when the board was in session and talked with the board there concerning this matter; thought it was in the afternoon of the 13th.

"By Mr. WINDSOR:

"Q. Was this conversation had with the Board of County "Commissioners? A. I did not say I had a conversation "with the board. I said I went before the board, I think, "on the 13th; in the afternoon, I think it was. It might "not have been." He further stated that, without being able to state exactly his words, he notified the board not to make any settlement with Mr. Howard involving this check in suit as representing the cash that it called for, and that is what he was there for.

He also stated that he had a conversation with Messrs. McKinney and Norton (who were the president and cashier of the plaintiff) concerning this check on the evening of the 13th of January, the day before the suit was brought. (This occurred, however, after the plaintiff had acquired the check.) That Messrs. Norton, McKinney, Keith, Wells, and Furbeck, and also Mr. Peck were present. He said to Mr. McKinney that they would like him to charge this check back to the depositors from (R., 82) whom they got it and not to get into any lawsuit which would be injurious to both of the banks and to the community, but to charge the check back. "I used the expression over and over again, "you have not paid out anything on it; you have not suf- "fered anything on it; charge it back." They declined to do so, and McKinney replied at one time during the con-

versation substantially like this: "The First National "bank has been doing that thing off and on, time and time "again, for years, and we do not propose to charge it back," and refused to do so.

E. G. WRIGHT, called by defendants, testified (R., 65, 66) that in January, 1886, he was district attorney of the county, and was present on the 12th of January at the settlement between the County Commissioners and Howard. Being shown the check in suit, he said he first saw it about four o'clock on the 12th of January in the hands of Howard, who laid it on the table occupied by the County Commissioners; did not see it endorsed, nor was it endorsed when it was brought there, nor did he see it that day after it was endorsed. Mr. Bailey was present when the check was brought in by Howard, and was seated near the members of the County Commission, and seemed to be acting in behalf of the bondsmen and of the county treasurer, Howard; that Bailey presented a petition to the board at that session, the 12th of January, he thought. His impression was that the first petition was presented before any money had been brought in and before the check came, and after the check came that day he thought Bailey drew a resolution and handed it to a member of the Commission. A copy of the proceedings of the board of the 13th of January were shown witness, and he stated that the second resolution was written by Bailey and offered to the board by one of its members. He stated that from the copy shown him of the proceedings of the board the resolution seemed to have been on the 13th of January, but it was his impression that it was presented on the evening of the 12th of January. He saw Mr. Wilkes in the Commissioners' room, he thought, between five and six o'clock on January 12; had a conversation with him when the board were present in the room, but not before the board, which, he thought, had adjourned about five minutes before Wilkes came into the room, but a majority

of the Commissioners were in the room. Mr. Phillips, clerk of the board, was present during a part of this conversation. Mr. Wilkes came in and called witness to one side of the room and wanted to know what had been done pertaining to the county settlement, whether they had accepted Howard's (R., 67) settlement. His recollection was that he told him he was not keeping the records of the Commissioners and Wilkes would have to see Mr. Philips, who was called out, and some conversation occurred between Wilkes and Phillips and the witness; that his, witness', recollection was that he said to Wilkes, in reply to a question as to what had taken place, "that it was too late, or something; that there had been "some action taken, but what it was I did not know; that "Mr. Philips kept the records of the business. My recollec- "tion is that Mr. Wilkes said to me that the check that had "come up there would be contested, or something of that "kind. I do not pretend to give his language or my own "at that time. I do not know what was done with the "check that night."

On cross-examination he could not say whether he had or not, still it was his impression that he told Wilkes on that occasion that he and the members of the board thought that the check was the same as cash. "The Commissioners "did not know anything about this conversation that I have "referred to. I did not convey it to them or tell them what "our conversation was."

John Thompson, called by plaintiff (R., 91), testified that he was one of the County Commissioners of Minnehaha county in 1886, who made the settlement with Howard in January, 1886; that the board was comprised of John McKee, chairman, Arthur Jones, G. E. Bannister, Ole Berdahl, and himself, and that N. E. Phillips was clerk; that Howard presented his bank book to the board and the board (R., 92) refused to take that in settlement, and told him either to bring the money or a certified check. He went back to the

bank and brought up a letter from the president and cashier of the First National bank. (A copy of the letter was shown the witness and identified by him, and is set out on a previous page of this statement). "The board would not accept of any "settlement without either the money, currency, or a certi- "fied check; that is what the board insisted upon." Howard went back to the bank and brought a check. The check in suit was shown witness and he said, "that is the check "he brought up or one that is very much like it. I saw "this check. We accepted that for that amount in settle- "ment with Mr. Howard. He had some currency on hand. "The amount of currency and some drafts and orders and "that check made up the amount he was indebted to the "county. That check was, I think, presented on the date it "bears, January 12th, 1886. I am not positive what time "of the day Mr. Howard went down after this check, some- "where near four o'clock in the afternoon."

He also stated (R., 93) that he was somewhat acquainted with W. A. Wilkes, and that Wilkes "did not appear be- "fore the County Commissioners on the 12th day of Jan- "uary. I think he was in the room late in the after- "noon, after the board adjourned, either the 12th or "13th. I will not be positive. He did not make any com- "munication of any kind to the board with reference to this "check on the 12th. He never made any statement of any "kind before that evening. At the time we took this check "we didn't have any question that there was anything wrong or claimed to be wrong about it" (R., 93). He also stated on cross-examination that when Howard brought the check to the board he laid it down on the table, the entire board being there at the time, and Mr. Wright also being there and, he thought, Mr. Bailey; that the check was examined by the different members of the board and then referred to Mr. Wright, the county attorney, and pronounced good by him—as equivalent to the cash or currency. Could not say what was done with the check, but did not think

any action was taken by the board concerning it that evening; thought the board counted the money and the drafts that afternoon before Howard brought the check; that they knew the whole amount after he brought the check, made computation of the amount, and after that was done he thought Howard's bondsmen took charge of the money, drafts, and check; that the funds (R., 94) were kept in a little tin box, but he was not positive whether the bondsmen or Howard took charge of it that evening. It was in Howard's control until it was turned over to the bondsmen; that the County Commissioners turned it over to the bondsmen because the principal bondsman, J. B. Young, had left the county and gone to California. Young had justified for $50,000 on the bond and had left the country, and that made Howard's bond of no security, and the board required additional bondsmen from Howard, and while he was furnishing these the funds were turned over to the bondsmen of Howard. He did not remember whether this action concerning the bond was taken by the board on the 12th or not, but that the records show correctly. It was his impression that the bondsmen took possession of the funds that evening, but was not positive; that his memory was very poor as to that; that when Howard came before them with the check and the money and made this showing they considered he had made a fair showing as county treasurer. The bondsmen of Howard had petitioned to be released, but he was not positive whether their petition was made the evening of the 12th or prior. He thought it was a little before that, perhaps before that day. He did not know when the check was taken from the place where it was given to the board on the evening of the 12th. The board felt the county was not secure, as one of the bondsmen had gone away. He did not think after the board counted the money and the checks that they were given back to Howard, but were turned over to the bondsmen, but he was not certain; did not remember who took charge of the check that afternoon, the 12th, but

thought that it was on the 13th that it was turned over to the bondsmen, but was not positive. The funds were turned over to the bondsmen by resolution of the board during the time that Howard was getting additional bond. (R., 95.)

JOHN MCKEE, chairman of the Board of County Commissioners (called by plaintiff), testified (R., 95, 96) that he examined the bank book of Howard and it showed a credit of somewhere about $15,000 or $16,000. He examined the book to see, but the board would not accept the settlement, would not take the bank book, and told him they would have to have something more definite than that (R., 96); that Howard then went back to the bank and brought a slip of paper (which has been set out above, signed by Wells as president and Furbeck as cashier). It was passed over to witness, and he examined it and passed it to the district attorney, who said it was only a letter of credit, and told Howard that we had to have something more definite than that. He again went to the bank, this was along in the afternoon, and said that he would bring a check from the bank. When he brought the check witness looked at it and passed it to the district attorney, who said that as soon as Howard endorsed it it would be as good as money, and that the board received it the same as money. He also stated that he knew W. A. Wilkes, and that he did not appear before the board on the 12th of January, the date at which the check was presented by Howard, so far as witness saw; that the board did not have any communication with him at all on that day in regard to the check or otherwise; that Wilkes never at any time came before them as a board and notified them that there was anything wrong about the check.

On cross-examination he said that Wilkes never said a word about the check that he remembered; that Wilkes did say on the 13th of January that the board had no right to turn the money over to the bondsmen, but so far as the check was concerned he didn't remember anything said about it.

It wasn't mentioned; simply the question that the board had no right to turn it over. He further testified (R., 97) that they examined the check when Howard brought it before them on the afternoon of the 12th, but did not know that they did anything more concerning it. Either some member of the board or Mr. Wright asked Howard to endorse it because of the opinion of Mr. Wright that as soon as endorsed it would be as good as money. He did not know what was done with the check that afternoon; could not state positively whether it was endorsed that night or next morning, but they did nothing concerning it that night as a board. His recollection was that Howard brought in the check and they adjourned right away until the next morning, and that Howard took the money and the currency he had in a tin box that evening, but did not know whether he took the check; that the bondsmen put in an application to be released from the bond, but was not positive whether it was done that evening or the next morning; that Howard was before them the next morning, the 13th, and he thought also his bondsmen; that, if he remembered rightly, the money was turned over to the bondsmen that morning, and that Mr. Hollister took possession of it, it being there on the table; that Howard had possession of it until the bondsmen took possession of it; Howard turned it over to them by order of the Commissioners, box, money, and checks being all together on the table. The witness did not remember meeting Mr. Wells on the morning of the 13th of January and the latter warning him not to take the check in suit, because the bank would not pay, and that Howard had diverted it from the purpose for which it was issued. (There is no such testimony in the case as the question calling for this answer assumes.) Witness had heard (R., 98) before election times that Howard was behind, but at that time (settlement) the money was right before them.

EBEN M. HILLS, called by defendants (R., 56), testified (R., 56–7) that he knew Arthur Currey, assistant cashier of the plaintiff, and that in the evening of January 12, 1886, at a railroad meeting in the court-house, had a conversation with him "concerning a certain check issued by the cashier "of the First National bank;" that he couldn't say that the amount of the check was stated, but it was talked that the amount was large, and he presumed that the amount was stated, but couldn't say so from recollection; that it was stated that the Commissioners were having a settlement with Howard, and that he had sent his usual bank book (R., 57), and the Commissioners were not satisfied with it, and he afterwards sent up the check, "and that it was issued "with the expectation that it would come back as in former "settlements; that money had been sent up in a pillow to "the county treasurer's office, and they had given a check, "and it hadn't come back, and it was afloat, and that some-"body else would probably get it away from the First "National bank."

ARTHUR L. CURRY, called by the plaintiff (R., 105), testified that he was assistant cashier of the plaintiff in January, 1886, and that he heard the testimony (last above) of Mr. Hills in regard to a conversation he claimed to have had with witness at some railroad meeting and said: "As I had no "knowledge at that time of the existence of the check I had no "conversation in relation to it. I frequently had conversation "with Mr. Hills, and I apprehend that he is mistaken as to the "time. I might have had that conversation, but I had no "conversation at that time with him on that subject. I did "not know at that time that the bondsmen were trying to "be released nor did I know that the check was issued. "Mr. Hills must be mistaken as to the time." He also said, on cross-examination, that he had no recollection meeting Mr. Hills on the evening of the 12th. He was unable to say whether he was at the railroad meeting; did not re-

member whether there was a railroad meeting or whether he met Hills on that occasion (R., 106). "I could not have "spoken to him about this check, for I could not have "spoken of what I did not know, and I knew nothing of "the check."

FRANK IRVINE, whose deposition was read by defendants, testified that in January, 1886, he was employed as a clerk in the Dakota National bank; that he had seen the check; could not give the date, but it was about the 12th of January, in the front room of the Dakota National bank. He took it to the defendant bank and presented it to Mr. Furbeck, who showed it to Mr. Wells, who was sitting near, and he and Mr. Wells came to the window, and Mr. Wells said, "I don't propose to pay that." Witness took the check back to his bank. This was about eleven o'clock in the forenoon. Messrs. Hollister, Coates, and Bailey were in the back room of the Dakota National bank at the time. He did not know who owned the check, but it was endorsed "C. K. Howard;" that there was a tin box placed in the vault of his bank that day during the noon hour, but he did not know whose it was or what it contained.

On cross-examination he said he remembered that Mr. Brace and Mr. Bailey talked with him in regard to it after he presented the check.

JACOB SCHAETZEL, called by defendants, testified (R., 63) that he had resided in Sioux Falls 11 or 12 years, and his business had been dealing in horses and real estate; was a director in defendant bank and had known Mr. McKinney, president of plaintiff, about six or seven years; that he had no conversation with McKinney at or about the 13th day of January, 1886, concerning the $16,000 check, but heard a conversation of Mr. McKinney, between half past 12 and 1 o'clock, at the Cataract house, in which building plaintiff's bank was; that the hotel office is an L shape and sur-

rounds two sides of the banking-room, and there is an opening, by a door, into the banking-room from the hotel office. He further said, "When I speak of office I mean hotel "office. I came in from the back door—from the Ninth-street "entrance, what is called the ladies' entrance. As I came "into the office I saw Mr. McKinney and Mr. Henry Cor-"son, I think, and one other man was standing there, and "I heard them talking about a check, and Mr. McKinney "asked, 'What is it? Is this a straight cashier's check?' "and (R., 64) I think Mr. Corson—Henry—said, 'Yes.' "He says, 'I would like to have it. They would either pay "it or close their doors;' that this was between half past 12 "and 1 o'clock, and that Mr. McKinney boarded at the Cat-"aract house at that time; that there had not been any "meeting of the board of directors concerning the issue of "this check."

On cross-examination he stated that he never had any trouble with plaintiff prior to this date; a long time before it had protested a note of his. He had no trouble, paid the note, was angry about it, and said some pretty ugly things about Mr. McKinney and Mr. Norton, not as men, but as officers of the bank. He stated that he had no conversation with Mr. McKinney himself on the 13th of January.

George H. Brace, (R., 78) called by defendants, testified that he was president of the Dakota National bank in January, 1886, and knew Mr. McKinney, who was president of the plaintiff at that time; that he took dinner at the Cataract house on January 13, 1886, he and McKinney boarding there and being in the habit of sitting at the same table; that he thought McKinney "asked the question in what "little conversation there was—there was not much said upon "the subject—I think he asked the question, if I knew who "was to get the deposit, and I replied, I did not. The de-"posit that was referred to was the county treasurer's de-"posit. There was not much said, but I think there was

"something of that kind said. I think Mr. Carpenter, Mr. "McKinney, and myself were all that were sitting there at "that time; probably some one else might have been there: "I cannot say as to that."

The defendants read the deposition of Charles C. Carpenter (R., 77), who stated that he was connected with the Dakota National bank and was acquainted with Messrs. Hollister, Coates, Bailey, and Corson, and thought that they were all in the witness' bank together about the 13th of January, 1886; that he thought he had a conversation after dinner with Mr. Hollister about getting the credit at another bank; that the tin box was left in "our safe during the noon "hour. I think Mr. Coates took it from the bank. Mr. "Bailey, Mr. Hollister, Mr. Corson, Mr. Coates, Mr. Brace, and "myself were present at the time of its being taken." Some of them went out of the back door, which ones he could not say, taking the box. Witness took dinner that day at the Cataract house with Mr. Brace, Mr. McKinney being at the table, and with whom he had very little conversation; that he thought McKinney asked him if he had been up to the Commissioners' room, or if he had heard what they had done about settling with the county, and witness told him he had not. He could not remember anything further that was said.

The record of the County Commissioners was by the defendants read in evidence, by which it appears (R., 79, 80) under date of January 12, 1886, that "C. K. Howard pre- "sented his semi-annual statement and the settlement with "the county treasurer commenced and books, vouchers, ex- "amined until adjournment. The afternoon was devoted "to settlement with county treasurer;" and also that under date of January 13, on motion, it was resolved that the county treasurer be required to give an additional bond in the penal sum of $50,000, it being the opinion of the majority of said board that the existing security had become insufficient for a proper indemnity of the county.

And that it was also under the same date resolved that the funds presented to the board by Howard in settlement of his accounts be "turned over to his bondsmen, and the "bondsmen are put in charge of the office of county treas- "urer until the additional bond is furnished, said funds to "be deposited and remain the funds of Minnehaha county."

And under date of January 18 it was resolved "that the "semi-annual settlement made with C. K. Howard, county "treasurer of Minnehaha county, to January 1, 1886, be, "and the same is hereby, approved, the vouchers and ac- "counts having been found correct as per statement filed "January 12, 1886," and that on the afternoon of same day Howard tendered his resignation as county treasurer, which (R., 80) was accepted, and C. L. Norton was appointed treasurer to fill the vacancy occasioned by Howard's resignation, and his bond was fixed at the sum of $100,000.

And that under date of January 19 the board directed the bondsmen of Howard to turn over to the County Commissioners all the evidences of deposit and all funds belonging to the county, and the official oath and bond of Norton were presented and the bond approved, and the check of the bondsmen of Howard in the sum of $27,236.63, certified by C. E. McKinney, president of the Sioux Falls National bank, in full discharge of said bondsmen for the funds received of the county on January 13, 1886, was accepted and the office turned over to Norton and his receipt for $27,236.63 in currency taken.

H. L. Hollister, called by defendants, testified (R., 57) that he had resided in Sioux Falls since 1877, and his business had been banking and insurance, and was engaged in banking up to two and a half or three years before the time he testified; had been cashier of the First National bank and was acquainted with C. K. Howard, who was county treasurer during that time, and had been one of his bondsmen for the last two terms that he served; that he was present,

at certain times, at the meeting of the County Commissioners at the January settlement. The other bondsmen were Coates, Corson, and Young. The occasion of his visits at the meetings of the Commissioners was that the bondsmen had applied through their attorney, Mr. Bailey, to be released from Howard's bond and had petitioned the Commissioners to take charge of the money and release the bondsmen; that the funds were turned over to him and the other bondsmen by the Commissioners and consisted of checks, drafts, gold, and silver. There was probably $17,000 or $18,000 of the $27,000 in checks; that he had seen the check in suit at the time the Commissioners turned it over to the bondsmen and was included in and a part of the funds that he had testified about and that the bondsmen receipted for; that the bondsmen received it on the 13th day of January, and he judged between one and two o'clock of the day. When (R., 58) turned over to the bondsmen the funds were in a little trunk or box, which witness took to the Dakota National bank, where it was set in the safe by the president while witness went to dinner. After dinner he took the box to the plaintiff, Mr. Coates and Mr. Corson, co-bondsmen, being with him. At plaintiff's they met Mr. McKinney, president; Mr. Norton, cashier, and Mr. Curry, assistant cashier, of plaintiff, and (R., 59) Mr. Bailey, and remained ten or fifteen minutes, long enough to count the money. Mr. McKinney and Mr. Curry assisted in counting the money, and then they gave him a pass book for the bondsmen and he went home. He was not asked to endorse the check in suit. They were not in the bank-room, but in the back office, there being three rooms. In going into the back door there is a kind of store-room, and the next door opens into the back private office, and the next room is the banking-room proper, where the counter is; thought there were six or seven checks included in the deposit; did not know whether he was asked to endorse other checks, but did endorse them. The omission to endorse the check in suit was not a mis-

take. They were not asked to endorse it. In answer to the question why he endorsed other checks and not the one in suit he replied that he thought some of the others were drafts on some outside banks and some post-office orders; that Mr. Bailey had told him before they went to the plaintiff that he had been to see Mr. McKinney in regard to this deposit; that (R., 60) out of the whole number there were over $2,000 in checks and post-office orders that he endorsed, being five or six instruments. Being asked what was the first thing he said when he went into the bank door of the Sioux Falls National bank, he replied that he presumed he said something—"I have brought you a deposit" or "here it is," or something of the kind; could not remember just what he did say, but referred to the county deposit; that it was understood that it was not his deposit. He told Mr. McKinney that it was the county funds; the books showed that; it was written bondsmen; was very particular about that, because he did not want it put in any other shape, only as the county.

He also stated (R., 61) that, while he acted as bondsman for Howard, he presumed he knew as much about his business as Howard himself. The only change made in the account was a small credit, currency deposit. Neither McKinney nor any officer of the plaintiff ever asked him to take the check back, nor had he or any other bondsmen been called on to make the check good. He remembered, as a banker in Sioux Falls, three or four instances in a period of seven or eight years in which he had seen individual checks presented to the amount of sixteen thousand dollars. He had known C. L. Norton (cashier of the plaintiff) since 1879; did not employ Bailey to assist in making deposit at plaintiff's bank; never had any communication from plaintiff in regard to taking the deposit to it and sent nobody there, nor did the plaintiffs send any one to the bondsmen, to the knowledge of the witness, but (R., 62) when he returned from dinner, between 1 and 2 o'clock, he

had communication with Mr. Bailey near the Dakota National bank.

The bank book of the bondsmen was read in evidence, and showed (R., 63) a deposit on January 13 to the credit of H. L. Hollister, C. G. Coates, and W. H. Corson, bondsmen, of $27,236.63 and of $430.

CLARK G. COATES, one of the sureties of Howard, called by defendants, testified (R., 64) that he had known Howard since the spring of 1879; that he had seen the check in suit during the last settlement with Howard, and that it was turned over to Howard's bondsmen, he thought, on the 14th of January, but he was not certain about the date, who took it to the Dakota National bank, and afterwards, about two o'clock in the afternoon, to the plaintiff, Hollister and Corson being with him; that Mr. McKinney, Mr. Norton, the cashier, and Mr. Curry, assistant cashier, of plaintiff, were in the office while the bondsmen were there; staid there long enough to count the money and make the deposit. Mr. Bailey was also there, but did not go with them; did not know (R., 65) that "there was anything in particular talked "about the check at that time; nothing more than it called "for $16,000 and we were to have a deposit for $16,000, what "the check called for." He did not endorse the check. The bondsmen received the bank book, and witness "heard "nothing said between the bondsmen and Mr. McKinney "in regard to his taking this check to collect." He thought Mr. Bailey, after the money had been counted, said to Mr. McKinney, "That is a pretty good-sized check; you had "better go and get your money on it," and that McKinney said, "He would collect it or see that the doors did not open "the next morning." That it might not have been worded just that way. He did not remember that anything was said about keeping still; had no talk with officers of plaintiff the next day; that plaintiff did not ask him to endorse the paper at the time of the deposit.

The defendants read the deposition of W. H. Corson, who testified (R. 73) that he was on Howard's bond; that he first saw the check in suit in the County Commissioners' room when trying to get their matters straightened up on the county treasurer's business, he being on the bond and seeking to get released; never had the check in his possession. It was put into the box with other moneys and taken down to the Dakota National bank (R., 74) about half past 11 o'clock on the morning of January 13; thought Mr. Irvine took the check to the First National bank and presented it for payment; about 2 o'clock the box, money, and check were taken to the plaintiff; that the bondsmen did not agree to endorse the check. Mr. Hollister said to witness that the plaintiff "will take the check and give us credit for that amount of money," and witness replied that his idea was that it was the best thing they could do; that in going from the Sioux Falls National bank to plaintiff they went out of the back door of the former and took the river route and went into the back door of plaintiff, where they met, he thought, Mr. McKinney, Mr. Norton, and Mr. Bailey; that their object in going the river route was because it was the shortest way to go to the Sioux Falls National bank; that he did not recollect any conversation there (at plaintiff's) particularly; thought Mr. McKinney said if the check was not paid the bank would not open their doors to-morrow morning; that there was nothing said concerning their going from the Dakota National bank there; did not think there was any word of caution expressed by Mr. McKinney or Mr. Curry while they were in that room. There was no caution given witness on the part of any of the bank officers; that there was some little caution that he was to take care of himself. He wanted to go—get out as quick as possible; that (R., 75) he knew there was a question in regard to this check. He thought nothing further was said about paying or not paying this check by Mr. McKinney or any of the parties present. They were talking about the thing

in a general way. He did not call to mind the conversation or any part of it during that time; did not think anything was said about their having presented it to the First National bank. Being asked if he did not remember of McKinney cautioning them not to say anything about the check having been presented, he said he thought there was such a conversation, but when it occurred he could not tell—could not tell whether it occurred at that time or some other; that they sent for them to come down the next morning. It might have been at that time or some other time; thought Mr. McKinney sent for him, Hollister, and Coates; could not recall that McKinney cautioned them about saying anything about the check to any one.

SAMUEL T. CLOVER, called by defendants, testified (R., 67) that in January, 1886, he was publishing the Sioux Falls "Leader" and knew Arthur Curry, at that time assistant cashier of plaintiff; that on the morning of January 15 he he had a conversation with Curry concerning the $16,000 check issued by the defendant bank to Howard; that Curry asked if witness had written an article in relation to the bank check, to which he replied that he had not, but was investigating it and wanted to give the facts as they stood; that Curry said plaintiff had done a great deal for witness and now was the time for him to stand by them; that it was a matter of vital importance to them; said the bank had the check and invited witness down to look at it, which he did later on; told witness (R., 68) the bondsmen came down in company with Mr. Bailey to the office of the bank on Thursday and Mr. Bailey acted for the bondsmen and they had got the check, and he assured them it was all right. Witness remembered questioning him closely about it, and he told him they were all right—anyway, Mr. Bailey had assured him that they were all right—and they would either have to pay—the First National bank would have to pay—the check or they would bust the bank.

"COURT: And so he took it?

"WITNESS: Yes, sir. That is a pretty story. I kept a "deposit in the Sioux Falls National bank at that time. I "was always required to endorse paper. That was always "the custom at that bank with me."

This witness on cross-examination said: "Q. You are not "friendly with the officers of the Sioux Falls National bank, "are you? A. Indeed, I have the deepest kind of grati- "tude. Q. You are very friendly? A. Yes, sir. Q. I call "your attention particularly to the time when you were in "my office some two or three weeks ago. In speaking of "your being a witness in this case, did you have a conversa- "tion with me in regard to that? A. No, sir; not in regard "to that—not before to-day. Q. I will ask you if in that "conversation you did not say when you got through with "the Sioux Falls National bank—when your testimony was "heard—that you would have paid them up for their work "last fall? Did you or did you not make that statement? "A. It is very possible, but I cannot recall it. Q. You do "not say you did not? A. No; I do not deny anything. "At the same time, that would not affect my gratitude to "them. I assure you I have the kindest respect for them "all."

The plaintiff called ARTHUR L. CURRY (a portion of whose testimony has already been given in another connection), who, in respect of the deposit made in plaintiff's bank, etc., testified (R., 105) that in January, 1886, he was assistant cashier of the plaintiff; that he was not in the bank when the bondsmen came with the deposit, but came in while they were there, and Mr. McKinney (the president) asked him to help him count the funds and he did so. The wit- ness, after they were counted, carried them into the front room and, as he was acting teller at the time, made the entries in the books of the bank, which he produced at the trial, and said: "This is a book of first entries; it is the

"cash book of our bank at that time. It shows the entry "of this deposit made in my handwriting. I made it at "that time. On the left we put down the name of Hollister "and bondsmen and charged cash $27,236.63 and credited "the account to the deposit. (Book shown witness.) This "book is an individual ledger, used at the time this money "was checked out. It is a book of original entry.

"Q. What time was this money, as testified to, checked "out by the bondsmen? A. January 19th, 1886. (Bonds-"men's pass book above set forth shown witness.) That is "what we call a pass book. It was made on the occasion of "that deposit. The entry is in my handwriting. I made "it at the time for the purpose of giving them credit. I "was present during all the time this money was counted "and participated in the counting. Mr. McKinney was "assisting me and Mr. Hollister was also checking over "some part of it. Nothing was said by any of the bonds-"men or anybody else there present about this check having "been presented anywhere or that there was anything "irregular about it in any way, shape, or manner. I never "saw or heard of this check until this time when it was "brought there for deposit. When we received the check "we gave them credit for it as cash."

On cross-examination (R., 106) he stated that this check that was deposited was credited as cash; that it was the custom to credit these items as cash; that nothing was said in his hearing concerning the taking of it as cash; that the deposit was taken in the usual, ordinary course just the same as other deposits. "If checks were brought in by the "party to whom they are drawn we should require an in-"dorsement; if they were not brought in by the party, the "payee or drawer, it depends largely upon the check whether "we would require the indorsement of the party bringing "it. We were perfectly familiar with every signature on "this check. It is not our invariable rule to require in-"dorsement. This is a case where we did not require in-

"dorsement. It is a case where we were acquainted with "the signature on the back of the check. We were satisfied "to take it from any other party simply on the indorse- "ment on the back of it. We considered that Mr. Howard "had assigned his interest in it to the holder of the check. "Q. Whom did you consider the holder of the check? A. "We were to become the holder of it. Q. Interested in "getting hold of the check? A. Yes, sir; as a deposit. We "customarily followed the law concerning the protest of in- "dorsed paper."

He further stated that plaintiff before this time had taken cashier's checks from the defendant bank and always treated them as cash; could not say how they were taken as to indorsement, but assumed they were in proper form, properly endorsed.

The plaintiff also, in rebuttal, called C. E. McKINNEY, who testified (R., 98) that he was the president of the plaintiff, and that its bank, in January, 1886, was located in a building facing west on Phillips avenue, in a room twenty-two feet wide; that as you went into the front door of the bank the counters began on the left, near the door, and went down to a partial partition running from the side of the room to the vault; that this partition was about seven feet high; there were no doors in it, but open archways, one on the outside and one on the inside of the counter; that divided the front room, as they termed it, into two parts—the front room where they handled cash and the general business of the bank, and the rear room where they transacted the business of the directory, real-estate and other business; that behind this was a full partition with a door in the center, opening into a rear room, which was a store-room; "that "depositors of the bank frequently came in the rear door "to make their deposits. Some did not come in any other "way.

"This rear door of the bank was about thirty feet from

"Eighth street." That at the time the deposit of the county funds was made by the bondsmen he thought Messrs. Hollister, Coates, and Corson came to the bank; that Messrs. Curry, Norton, Bailey, and the witness were present. When they came into the bank he was busy in the front part—the banking-room. He did not know which way they came into the bank. When he first saw them they were in the rear part of what they called the directors' room and real-estate office. When witness came into the room Mr. Hollister, who was standing by an upright desk along the side of the room, said (R., 99): "I have brought you a deposit. "I make it about so much. You count it over and see if I "am correct;" and turned out the money, composed of bills, silver, gold, and checks, and witness began counting the money. Mr. Curry came in at that time, and witness asked him to help count this deposit. They counted it, and he said to Mr. Norton, 'Make out a book for this deposit," and Norton got a book and in reply to his question was told, either by Mr. Bailey or Mr. Hollister, to make it out in the name of Hollister bondsmen, as bondsmen. After witness counted the money Mr. Curry took it into the front room, on the counter where the telling was done and the credit was given. He thought Mr. Norton brought back the book and handed it to Mr. Curry, who made the credit and gave the book to Mr. Hollister, and the bondsmen left; that the check in suit was a part of that deposit. He further said: "I ran the checks over, and I think as I came to this I said, "'This is a good, nice check, a good-sized check,' and Mr. "Hollister said, 'Yes.' I said, 'That is a good check.' He "said, 'We regard them as cash, and I said, 'Certainly.' "He said, 'I want this deposit as cash,' and I said, 'As far "as I see, I don't see any reason why not. We consider it "as cash. We regard this as cash." We had before this "time received cashier's checks of this same bank and "treated them as cash. They had always been paid on "presentation."

He further testified (R., 99): "I had no knowledge or in-"formation from any of these parties that there was any-"thing claimed to be wrong about that check at the time "we received it. There was nothing said by any of them "with reference to it. I did not have any knowledge or in-"formation from any source that there was anything wrong "claimed about this check. I heard the testimony of Mr. "Schaetzel in reference to the conversation which he claimed "to overhear." He further said, referring to the testimony of Schaetzel, that he had no such conversation in the Cataract house on the 12th of January, 1886, nor on the 13th of January, but on the next day, the 14th, he had a conversation with Mr. Corson and asked him to go on the attachment bond, which he did; did not think (R., 100) he had any conversation with Corson on the 13th in reference to the check, or that he (witness) knew anything about the check or had as much as heard of it at that time. Witness heard Mr. Hollister's testimony and didn't think that he asked him to endorse any checks or drafts; those made payable to C. K. Howard, as county treasurer, were not endorsed at all. He, Hollister, "said they were in charge of the funds of the county treasurer and ought to have the right to endorse for Mr. Howard," and witness thought he did endorse in the name of C. K. Howard; that was the extent of it, and if he (Hollister) did anything more than that he was not asked to.

On cross-examination he testified (R., 100) that the first time he saw the check was when it came there to be deposited; that Mr. Hollister stated they had charge of the funds while the county treasurer was getting his bond. Witness supposed he claimed to deposit the funds in the character of bondsman; that was the way the deposit was made out and witness simply inferred from that that there were various other checks with this one on various banks of the city, probably ten or twelve. He also stated: "It was customary for "quite a number of our depositors to come in at the back

"door; the back door opened out onto a platform leading to "the public highway, Eighth street. There was a vacant "space of ground running north and south by the rear door "of the building, which allowed teams to come in with "goods down to the stores. I do not know as you would "call it a public highway. It was a road that was traveled. "It is not a fact that this back door opened almost on the "river bank. There are several buildings, one or two, be- "tween out-building and the river. Our bank was in the "building on the corner of Phillips avenue and Eighth "street. The building was 44 feet wide, and we had the in- "side 22 feet. In going south from the back door of our "bank there was no regular street, but there was a vacant "space between the building and the river from 50 to 100 "feet wide that was used by teams in delivering goods to the "rear of the block. There were a few outhouses back of "the building in this block. The back room of our building "was not occupied as an office. It was a sort of vacant room "where we sometimes put boxes or something of that kind. "I do not remember whether the platform extended further "south than our building or not. The Dakota National "bank was located in the same block south as ours was "north. I did not see these parties (R., 101) when "they came into the bank. I was in the front part of "the front room;" that really the directors' room and teller's room were all one, simply separated by a slight partition. He did not ask anyone to endorse the checks except in the case of perhaps two or three that were not endorsed by Mr. Howard; that it was the custom of his bank "if a man "brought in a check that was drawn to the order of the "party we would require the party's endorsement to whose "order it was drawn, but if we knew all the parties to the "check and either party brought the check in we did not "require the endorsement; and where the checks were made "payable to bearer we did not. As a general rule we did "not require endorsement of checks of that kind. I did not

"think it was necessary to have an endorsement of this "$16,000 check when it was brought to us by these men and "deposited. I knew all the signatures at the time, and we "regarded the check as good as cash. There was no talk "between me and Mr. Hollister and any of these bondsmen "concerning their endorsement of the check of $16,000 at "the time it was taken on deposit; nothing whatever said "about it. I did not ask these parties for any arrangement "of indemnity in case we did not get the money on this "check. I do not think we ever did at any time. We cer- "tainly didn't at that time. I did not go to the depositors "after I presented the check to the First National bank and "it was not paid, and talk with them about it. I do not re- "member that I ever talked with them about making the "check good to us. I have no recollection of ever going to "any individual one (R., 102) of these depositors after pay- "ment was refused and ask them to indemnify us for the "check or to take it back. I didn't have any conversation "with these depositors within a day or two after payment of "the check was refused and pending the commencement of "the suit, or talk with any of them concerning the rescind- "ing of the deposit. We did not charge the check back to "them on the books of account of our bank."

He further testified (R., 102): "I did not know that the "check had been presented for payment on behalf of the "bondsmen before they brought it to our bank for deposit. "I learned before the commencement of this suit—I think "the evening, probably, of the 13th, when you were down to "the office—that the check had been presented, and I also "learned that it had never been absolutely refused. I "knew when Mr. Norton presented it, as cashier, and de- "manded payment, but I did not know that it had been re- "fused to the bondsmen. None of the officers of our bank "went to see these bondsmen or any of them concerning the "return of the check after it was refused payment that I am "aware of. I gave no instructions. I think the (R., 103)

"money that was paid out by us on this deposit was paid
"out at one time and on one check, but I am not certain.
"Our books will show. I think there was nothing paid out
"on the account, this deposit account, prior to January 19.
"I knew before January 19 what Mr. Wells and Furbeck
"claimed to be the circumstances concerning the issuance of
"this check by Mr. Furbeck. I did not know whether they
"were true or not. I think Mr. Hollister was the first one who
"spoke to me about taking this deposit made by the bonds-
"men; that was about half past two or three o'clock in the
"afternoon of January 13th, the time they brought it there
"for deposit. I think I had some conversation with D. R.
"Bailey prior to that; it was right after dinner. I was
"sitting in the directors' room, where I could see into the
"teller's desk. I think Mr. Bailey dropped in, and I gave
"him a cigar, and asked him where he had been the last
"two days. He said he had been busy, I think, engaged in
"behalf of the bondsmen of C. K. Howard getting out on
"the bond; that J. B. Young had left and they wished to
"be released, and that that office had been turned over to
"the bondsmen with the money. I think I then inquired
"if they proposed to keep the deposit in the First National
"bank. He said they thought not. I asked him if he knew
"where they proposed to deposit, and he said he didn't. I
"said, we would like the deposit; we want to get it, and I
"see no reason why Mr. Hollister would not just as soon
"deposit with us as with any of the other banks. I think
"that was the substance of this conversation. I might have
"asked how much the deposit was or the amount of the
"funds that were turned over. If I did, I think he told me.
"Mr. Bailey did not not show me a list of what the deposit
"consisted of. He may have pulled out a piece of paper.
"I am not certain whether he made any statement concern-
"ing the deposit or not. He may have mentioned the fact
"of there being a cashier's check among the deposits. I
"don't remember whether he did or not. I was called into

"the other room and while I was in there he left. I do not "recollect of Mr. Bailey's being in the bank more than once "that day before they brought in the deposit. He may "have been. It was one of our busy days. Nelson Bailey, "a son of D. R. Bailey, was employed with us some time "after that—I think some two or three weeks. After learn- "ing that this was county money I did not go to see the "Commissioners or any of them about it, nor did I have any "consultation with them in regard to the check." That he did not think he had seen the resolution transferring the money to the bondsmen; did not know that he ever heard it till he heard it read to-day. Up to that time he had received for deposit over the counter money drafts larger than this one in question. They were not a common occurrence, but a frequent occurrence.

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BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

I.

The Board of County Commissioners of Minnehaha County was the official body to which the administration of the fiscal affairs of the county and the acquisition, management, and disposition of the property of the county were intrusted. It was required to sit "with open doors and transact all its business in the most public manner" and to hear only when in session "all matters pertaining to the interest of the county," and from the decisions of the Commissioners "upon matters properly before them" an appeal was authorized to the district court at the instance of any party aggrieved. The duties imposed and powers conferred by the statute upon this Board of Commissioners were in their character both administrative and judicial. (Compiled Laws

Dakota, 1887, sections 585, 592, 593, 604, 610, 615, 639, 1658, 1659.)

II.

It was the imperative *duty* of the county treasurer to *settle* his accounts with the County Commissioners in January and July of each year, and to secure accuracy and efficiency in such settlements he was required to exhibit to the board (the Commissioners could act in such matters only when in session) "all his books, accounts, and moneys and all vouchers relating to the same, to be audited and allowed;" and it was made the duty of said board, if his books, accounts, moneys, and vouchers were found correct, to certify his accounts. If found incorrect the statute declared him liable on his bond. (Com. Laws of Dakota, sec. 639.)

The duties imposed and powers conferred in respect of these semi-annual settlements of the county treasurer were imposed and conferred upon public officers. The matter to be dealt with by them was the property of the county. The treasurer, whose duties were defined, was the person to whose custody (not ownership) the property of the county was intrusted for specific purposes, and the Board of Commissioners was the body which was given the power and charged with the duty "to superintend the fiscal concerns of the county and secure their management in the best manner" (sec. 593); and whatever either the treasurer or the Board of County Commissioners properly did in complying with the requirements of the statute in making such semi-annual settlements was not only valid because directed or sanctioned by the statute, but passed at once beyond the *recall* or *control* of either of them.

III.

On the 12th day of January, 1886, C. K. Howard was and for a number of years had been county treasurer of the

county of Minnehaha. His settlement as such treasurer before the Board of County Commissioners, which is involved in this controversy, was due on the 12th of January, 1886, and the work of making it was on that day entered upon by him and the board. No difficulty arose as to his accounts, either receipts or disbursements. They were found correct and the balance in his hands determined to be $27,236.63.

Whatever the fact may have been, the law presumed these funds to be where it required them to be—in the possession of Howard as treasurer of the county—and it was his duty, imposed by the statute, to produce and exhibit these funds to the board, as it was the duty of the board to require their production and submission to its "inspection and examination." (Section 639.)

This statute was a public one. Not only Howard and the Board of Commissioners knew what it required, but all other persons, whether natural or artificial, knew what it required. The parties were acting under a public statute, dealing with a public trust, and no room for misconception or doubt, either as to the nature, extent, or effect of Howard's settlement and of each statutory step required in making it, did or could exist.

This balance in Howard's hands having been ascertained to be said sum of $27,236.63, he was directed to exhibit it to the Board of Commissioners. He accordingly produced, as proof that he had the required amount in money or its equivalent, some currency and coin and some checks on different parties, amounting, it seems, in all to $11,611.62. Of the currency and coin he had the actual possession, and his right to demand and obtain immediate and actual possession of the amount represented by the checks was, it seems, deemed by the board a compliance with the statute. But for the rest of the funds, $15,625.01, he exhibited his bank book, issued to him by The First National Bank of Sioux Falls (one of the plaintiffs in error), recently written

up and showing a credit balance in his favor, in his official capacity of treasurer, of $15,625.01. The board did not think this a compliance with the law. And Howard was evidently of the same opinion, for he at once went to his bank, the said plaintiff in error, and returned with the following instrument, signed by both the president and cashier of that bank:

"FIRST NAT. BANK, SIOUX FALLS, DAK.,
"*Jan'y* 12, 1886.

"The books of the bank show a credit in favor of the county of $15,625.01. If you wish, you have the privilege of examining the books.

"R. J. WELLS, *P't.*
"W. F. FURBECK, *Cas.*"

This he exhibited to the board in lieu of his bank book. True, this was a specific declaration by both the president and cashier of the bank that its books showed a credit in favor of the county on the very day the balance of the money of the county, in the hands of Howard, had been ascertained and fixed by him and the board of commissioners; still the board, it seems, deemed it a duty to require, as the statute contemplated it should, and the duty of Howard to make, as it evidently was, an exhibit of the balance in his hands in a more definite and substantial form than a simple credit on the books of a bank, which books would necessarily remain in the possession of the bank, not in the possession of the county's selected officer. And Mr. Howard again acquiesced in the correctness of the board's decision and returned a second time to his said bank and obtained a cashier's check, of which the following is a copy:

"No. 91. "SIOUX FALLS, DAK., *Jan.* 12, 1886.

"The First National Bank of Sioux Falls pay to the order of C. K. Howard, Co. treas., sixteen thousand five hundred seventy-one and $\frac{61}{100}$ dollars.

"$16,571.61. W. F. FURBECK, *Cas.*"

Across the face of the check the words "cashier's check" were printed. This check, payable to him in his capacity of county treasurer, he produced to the board, and was informed by it that when indorsed by him it would be regarded as sufficient, which indorsement he accordingly made in blank. No communication had passed between the bank and the board. Mr. Howard alone had communicated with the bank, and what passed between them was not disclosed to the board of commissioners. It is claimed by plaintiffs in error that the board did receive a notice from said bank in respect of said check. This the defendant in error denies. It will be noticed further on in this argument.

IV.

Howard, by his conduct in adjusting his accounts with the Board of Commissioners, fixing the amount of the money of the county in his possession and exhibiting to the board that portion of the money which was actually in his hands and the evidence of his unqualified right to take, on demand, into his actual possession as treasurer the remaining portion, was bound by what occurred between him and the board. He did not, never has, nor has any one for him, disputed the correctness of the amount of the public money which was ascertained by his settlement on the 12th day of January, 1886, to be in his hands. He produced his bank book showing that a portion of that money was on deposit to his credit in the bank. He would not, for the purpose of showing that either he or the Board of Commissioners did not do their duty as required by the statute, be allowed afterwards to deny that he had that amount at the time in said bank to his credit as county treasurer. Nor would he afterwards be allowed to deny it for the purpose of defeating the county, or any one claiming under it, if it had acted upon his representation as true. One who in his capacity as a public officer claims to have done an act or

assert the existence of a fact, which act or alleged fact is treated or accepted as the performance or discharge of an official duty, and which, if such act or fact is not denied by him, operates to all intents and purposes as a performance of such duty, will not be permitted to say that the duty remained unperformed, either because the act was not done or the fact did not exist. The law cannot admit such license in one to whom the performance of a public duty has been intrusted. He cannot escape from the fact that he always acts in a trust capacity. Mr. Howard, having asserted to the Board of Commissioners that a certain portion of the money of the county in his hands as treasurer, which was represented by his bank book, or by the certificate of the president and cashier of the bank, or by the cashier's check, was on the 12th day of January in the First National Bank of Sioux Falls to his credit as county treasurer, could not afterwards deny the truth of his statement or the existence of the fact represented by it; and this, too, independent of the technical notions upon which the doctrine simply of estoppel is placed. It stands upon broader ground and is essential to preserve and enforce the duties and obligations of persons assuming and executing official trusts.

And the First National Bank of Sioux Falls (plaintiff in error) is in no stronger or better position on this question than Howard, the county treasurer. It, knowing through its officers, as well as Howard did, what the duties of the county treasurer and Board of Commissioners were in respect of the settlement of the treasurer's accounts and the exhibition and inspection of the actual balance in his hands, wrote up and furnished him the bank book to exhibit to the board; prepared and furnished him the certificate, to exhibit to the board, asserting that his credit balance, as county treasurer, on the books of the bank, was $15,625.01; and finally issued to him, as county treasurer, to exhibit to the board, its cashier's check for $16,571.61. Howard, being

required to exhibit to the board all the county's property in his hands on January 12th, stated, represented to it, in effect, that a portion of it, the major portion of it, was on deposit in that bank. And the bank, through both its president and cashier, in effect said to the board, whose duty they knew it was to certify, ascertain, and act upon the statement as a fact: "Mr. Howard has told you the truth, and his pass book, which has just been written up, shows it. We also go further and state in writing, over our own signatures as officers of the bank, that the books of the bank also show it, as an examination of them will prove." And then further said, by their acts: "We will go further, as you do not seem satisfied, and prove to you that the county has that amount of money in this bank by issuing to it, or to its proper officer for it, a cashier's check, an instrument which is treated on all hands as equivalent to cash, because it is immediately convertible into cash." No substantial distinction can be made between the legal attitude of Howard and his bank in this transaction. If what they said and did was based on an actual deposit of the county's funds in the bank existing on the 12th day of January and subject to the check of Howard, as treasurer, which was the condition represented by both Howard and the bank to exist, then the truth was told and no one was or could have been misled or deceived. But if the fact was different, then Howard and the officers of the bank deliberately conspired to deceive the Board of Commissioners into auditing and certifying his accounts by representing a controlling fact to exist which did not exist. This cashier's check, made payable to the order of the officer of the county, submitted by him to the official body charged with the duty and clothed with the power of examining and passing on it as a part of the property of the county, and this, too, with the active co-operation of the officers of the bank, who knew what the statute required, was placed as much beyond the power of the bank to recall or repudiate or deny its validity as if it

had been based on actually existing funds of the county placed in the vaults of the bank by Howard at the time the check was issued. (Section 615, Compiled Laws Dakota, 1887.)

V.

If the bank could not, as against the county, repudiate the obligation of the check of its cashier, then it could not resist its collection in the hands of the defendant in error.

The Board of Commissioners was authorized, whenever in its opinion his security became insufficient, to require the county treasurer to give an additional bond or additional securities (Comp. Laws Dak., 1658). By section 592 power was given them to make orders respecting property of the county; and by section 593 it was made their duty "to superintend the fiscal concerns of the county and se-"cure their management in the best manner." The check in question, as well as the remaining portion of the balance found in the hands of Howard on January 12, was at once, by force of the statute, covered into the county treasury (sec. 615); and on the following day the Board of Commissioners ordered Howard to give additional sureties. And until such additional sureties were furnished the board directed that the funds which Howard had exhibited to it on the settlement of his accounts should be turned over by him to his bondsmen "to be deposited and remain the funds of Minnehaha county," and the bondsmen were also put in charge of the office of county treasurer. Howard complied with this direction, and the entire funds, including the check in suit, as well as the other checks exhibited to the board by Howard in his settlement, were delivered to his bondsmen, who deposited them the same day (January 13) in the bank of the defendant in error. This deposit was made in the names of the bondsmen, as bondsmen, the account being opened in that form and a bank or pass book issued accordingly. The total credit given these parties by the defendant

in error was $27,666.63, which included the $16,571.61 cashier's check referred to above; and on that day this cashier's check was presented by the defendant in error to the First National Bank of Sioux Falls, which issued it, and payment demanded and refused.

This check was a negotiable instrument, had been indorsed in blank by Howard, as county treasurer, and the title to it passed by delivery. The defendant in error received it, not for collection, but as cash, or its equivalent, and became at once debtor for the amount of it. The legal title to it passed to the defendant in error as completely as it would have done if, instead of becoming a debtor for the amount of it to the county, it had paid the cash for it. If it be true that a deposit in a bank creates the relation of debtor and creditor between the depositor and the bank, it must be because the title to the thing deposited passes by the act of deposit to the bank; and if a bank consents to accept a check as cash, and does so accept it, the effect is the same as when the deposit consists of cash. Whatever equities may exist or arise between a bank and its depositor in a given or exceptional case, and how such equities have been or may be adjusted in such a case, does not concern us here. If a bank and its depositor are agreed that the deposit is to be received and treated as cash and the right of the depositor to make such a deposit exists, then it follows that the title to such deposit passes to the bank, and the relation of debtor and creditor is established; and such was the case in this instance. If the title of this check and the right to demand and enforce its payment had, by reason of what had transpired, vested in the county, then the right of the county to obtain the cash for it from any one willing to give it, or to deposit it in any suitable depository and receive credit for it as so much cash, cannot be disputed, and no adjudication to the contrary exists or has been made. Decisions to the effect that credits obtained from a bank by discounts of worthless

notes or checks, taken by such bank in ignorance of their true character and through the fraud or imposition, either by representation or concealment, of the depositor, may be charged back to the account of the depositor by the bank, are not applicable in this case. But even in the cases mentioned the bank which has been imposed upon is not obliged to charge such deposits back to the account of the depositor. It is optional with it. Its action cannot be controlled or directed by any one liable on such note or check; and the claim urged in this case that it was the duty, or, in view of the fact that the deposit was received as cash, even the right, of the defendant in error to change its position with reference to the title to this check and the amount for which it had consented to become the debtor of its depositors, is without force and out of place.

And the objection urged against the right of the Board of Commissioners to turn these funds of the county over to the bondsmen of Howard and to require them to be deposited is equally untenable. That the Board of Commissioners had authority to deal with the subject of Howard's accounts and the funds of the county in his hands; the subject of requiring from him a new bond; the subject of the superintendence of all fiscal affairs of the county and their management in the best manner, has been seen from the various sections of the statute to which reference has been made; and the duty of the board to deal with these matters by orders and the right of appeal from such orders to the district court, as the only mode provided by the statute for their review, by any party aggrieved by such orders have also been seen; and as no appeal was taken by Howard or by any other party to the tribunal designated as the proper one to correct, modify, or reverse them, they stand unreversed. And the attack made upon their validity in this case is, in effect, an attack in a collateral proceeding and ought to be viewed and dealt with as such. But whatever view may be taken of this feature of the case, the fact re-

mains that the complaint against the action taken by the board is not made by any party having a right to object. Neither Howard nor his sureties nor any one in behalf of the county in its municipal capacity nor any tax-payer of the county has complained that the action of the Board of Commissioners was irregular or without legal effect. The objection comes from a source from which also came an active participation in creating the occasion for the very action of the board which is complained of and has no substance or merit in it.

And it follows that the question whether the defendant had notice of the origin of the check in suit before receiving it as a deposit is of no legal significance. For if the county could claim and enforce payment of the check, then the defendant in error, by virtue of the deposit of it with it and its acceptance of it, as above stated, could enforce payment of it. Hence all the testimony introduced by the defendants at the trial (and which is urged upon the attention of the court) relating to the question of the origin of the check and the private understanding between Howard and his bank in respect of it and seeking to fix upon the defendant in error notice of these matters prior to its receiving the deposit did not tend to establish any valid defense to the suit and should have been excluded at the trial. Consequently the direction of the court to the jury to return a verdict for the plaintiff was fully justified.

## VI.

The points urged in this Court by the plaintiffs in error fail to show any error in the action of the judge of the trial court.

1. The instrument issued on January 12, 1886, by the First National Bank (plaintiff in error), payable "to the order of C. K. Howard, Co. treasurer," for the sum of $16,571.61, was a cashier's check. It is idle to discuss

what other instrument known to the law merchant is similar to it or has some element in common with it. The fact is that it is a form of instrument in general use in the business of the country. It is issued by banks because of its convenience and has been assigned and occupies a prominent and permanent place in commercial transactions because of its negotiability, after endorsement in blank by the payee, by mere delivery and because the confidence in it is coextensive with the character and responsibility of the bank issuing it. In some parts of the country it has almost entirely superseded the "certified check," for which it is a convenient substitute, having like the latter the responsibility of the bank behind it and being like it, payable on demand, without days of grace. But by it all question as to the *fact* of the certification by the bank or the *extent* of such certification, which are incidents of the certified check giving use often to serious controversy, is silenced. Instead of being the check of A on a given bank, which that bank declares either orally, or in writing upon the check, to be good, it is a check issued by the bank itself and payable by itself to a designated payee or his order. The privity of contract between the bank and payee, and upon which such payee may base a suit for non-payment of the check on demand, passes to the endorsee of the check and will pass to his assignees by simple delivery. Undoubtedly it possesses, as the ordinary certified check does, some of the features of an inland bill of exchange; some of the features of the usual certificate of deposit; some of the features of a negotiable note. But it differs, as the certified check does, from all these instruments. Being a substitute for the certified check, designed to accomplish all the objects sought to be served by it and also the further object of settling in advance or rather avoiding all questions concerning the fact or the extent of certification, it is entitled to receive as favorable consideration, at least, in the hands of a holder as that to which the certified check is entitled.

2. The power of a national bank to issue such a check to its customer is as clear as its power to certify the check of such customer, and the power to do the latter has long been recognized and sanctioned by the courts. (Espy *v.* Bank, 18 Wallace, pp. 620–'1; Merchants' Bank *v.* State Bank, 10 Wallace, 604; 94 U. S., pp. 345–'6; Bull *v.* Bank of Kasson, 123 U. S., 105.) Nor can the authority of the cashier of a national bank to issue a cashier's check be questioned by the bank in a suit against it upon such check. (10 Wallace, p. 46.)

Nor can the bank be permitted in such suit to urge, as a defense, that the amount for which the check was issued exceeded a tenth part of the amount of the capital stock of the bank actually paid in by the stockholders. (Wyman *v.* Citizens' Nat. B'k of Fairibault, 29 Fed. Reporter, 734; Gold Mining Co. *v.* National Bank, 96 U. S., 640, 112 U. S., p. 451; Nat. Bank *v.* Matthews, 98 U. S., 621; Nat. Bank *v.* Whitney, 103 U. S., 99; National Bank *v.* Graham, 100 U. S., pp. 701–'2.)

3. The defendant bank in the court below was estopped to deny that Howard did not have sufficient funds to his credit to cover the amount for which it issued its cashier's check to him as treasurer, or that it had a private agreement with him by which he was either to return the check or make a deposit sufficient to cover it. The elements of an estoppel are abundant, for by so writing up his bank book as to show a balance of $15,625.01 to his credit as county treasurer, with the knowledge and intention that it should be exhibited to and accepted by the Board of Commissioners as an existing fact, the bank made a representation to that board of a material fact necessarily involved in the discharge of the official duty in which the bank knew the board was then engaged, and by following this with a written statement that the books of the bank, in its own custody, showed that such balance existed on January 12th, at the very moment when that was the question

under investigation and to be acted on, leaves no room to doubt that the bank knew it was dealing with a *fact* and intended to deal with a *fact*. And then, as an additional proof of the existence of this controlling fact in the transaction in hand, it issued its cashier's check, payable on demand to the county's treasurer or his order, for the said amount of $16,571.61. Manifestly, "the representation of a material fact" required by the doctrine of estoppel was persistently made. If the representation was true, there was no defense to the check. If it was a falsehood, then "the concealment of a material fact" was also persistently at hand. And in the nature of things the bank must have known whether what it represented was true or false. Hence its "representation was made with a *knowledge* of the facts." That the Board of Commissioners, to whom this representation was made, was "ignorant of the truth of the matter" is clear from the record. Moreover, it is apparent that this representation of the bank dealt with a fact which could only be known to it and Howard. The Board of Commissioners had no access to the *moneys* of the bank, and therefore had no means of verifying the bank's and Howard's repeated statements. True it was invited to examine the books, but these books were deliberately made to conceal the truth for the very purpose of deceiving the board. It will not do to say that the board might have suspected it. Public bodies of such a character are not, in legal contemplation, capable of *suspicion*. They act, because they must act, on facts, and they must rely on statements made them of the character and under the circumstances disclosed by this record. Again, the representation made by the bank was "made with the intention that the other party should act upon it," for it was the duty of Howard to exhibit to the Board of Commissioners the funds of the county which the settlement showed should be in his possession, and it was the duty of the board to inspect such funds and see that they were in fact in his

possession or under his immediate control. The discharge of this duty was the business of the hour and the bank knew it; and it was its intention to have the board inspect and accept Howard's bank book as showing the existence and whereabouts of the major part of the county's funds; to have the board believe and act upon the belief that the bank's own books showed the statement of Howard's bank book to be true, and, finally, by issuing its cashier's check, to represent to the board that the funds of the county in question were not only on deposit in it, but that they would be paid over on demand to any one holding such check and presenting it at its counter for payment. And it succeeded, for the board accepted the check, acted upon it, required nothing further from Howard in compliance with his and the board's semi-annual duty of settlement, exhibition, inspection, examination, and turning into the treasury of the funds of the county. Hence, not only "the intention that the other party should act," upon the representation made by the bank, but the fact that the other party, the Board of Commissioners, was "induced to act upon it," did act upon it, clearly appears. All the elements, therefore, technical as well as substantial, for the application of the doctrine of estoppel *in pais* are found in full force in this transaction. And if the principle that "certain admissions are indisputable, and estoppel is the agency of the law by which evidence to controvert their truth is excluded," should be given a practical application it should receive it in this case. And it is repeated, that if the county acquired, as against the bank issuing the check, a right to enforce payment of it, then the defendant in error succeeded to that right, and all discussion of any feature of the case involving the fact or effect of notice to it of the actual condition of Howard's account with the bank issuing the check is irrelevant. That the county obtained from the defendant in error the full amount of the check is apparent from the record. And as the defendant succeeded, as as-

signee of the check, to all the rights of the county, the suggestion that the plaintiff in the court below could not invoke the benefit of the estoppel because it was a stranger to the transaction out of which it grew is without substance, because it overlooks the fact that such plaintiff became the assignee of the very right which was validated and protected by that estoppel. Further consideration of the doctrine of privity involved in the law of estoppel is therefore unnecessary.

## VII.

The plaintiffs in error not only endeavor to affect the defendant in error with notice, before it acquired the check, of the alleged fact that the bank issuing the check really held no funds belonging to the county, but also assert that notice was given the County Commissioners, before they accepted the check, that it would not be paid.

So far as the defendant in error is concerned, the first answer to this is that the proof does not establish the claim made. The testimony upon this point, conceding it competent, would not have justified a verdict against the plaintiff had it been submitted to the jury, and even if an adverse verdict had been obtained it would have been the duty of the court to set it aside. And the second answer is, as we have seen, that, no matter what the proof on this point may have been, the plaintiff acquired the check from a party whose title to it could not be impeached.

So far as the county is concerned, it will be recalled that by section 604 (Compiled Laws of Dakota) it was provided that "all matters pertaining to the interests of the county shall be heard by the Board of Commissioners *in session only*." And it cannot, upon the evidence in this record, be maintained that any notice was given by the bank issuing the check to the board either in or out of session. A notice, *assuming* one to have been *intended* to be given before the check had actually accomplished the purpose of its issue

(which the defendant in error denies), to the clerk of the board or to the county attorney on the evening of January 12, was not a notice to the board. Neither the clerk of the board nor the county attorney was clothed with any power or charged with any duty which would affect the Board of Commissioners or the county with any notice given such clerk or attorney respecting this check, even if the provisions of the statute above cited were disregarded. Nor would such a notice had it been given to any one or more of the members of the board have been of any avail. And the trial court was clearly right in refusing to submit any such question to the jury. (Dillon's Municipal Corporations, vol. 1 (4th ed.), 322 (note); Nichols *v.* City of Boston, 98 Mass., 39; Harrington *v.* School District, 30 Vt., 155, p. 158; Bank *v.* Chase, 72 Maine, 226; Innerarity *et al. v.* Bank, 139 Mass., 332; Johnston *v.* Shortridge, 93 Mo., 227.)

The talk which the witness Wilkes testifies he had with Wright (the district attorney of the county, and Phillips, the county clerk), on the evening of January 12, the lateness of the hour at which he appeared, and the singular fact that he said nothing to any member of the board, clearly indicate that there was no serious purpose at that time to prevent the check from accomplishing the object for which it was issued. Wilkes does say, however, that he appeared before the board itself on the following day, January 13, but he also says it was in the afternoon. If he did appear on the afternoon of the 13th and notify the board that the bank would refuse to pay the check (in which he is pointedly contradicted by the chairman of the board, Mr. McKee, and by Mr. Thompson, a member of the board), still it was after the check had been endorsed by Howard and accepted by the board and delivered to the bondsmen to be deposited and had, in all probability, been in fact deposited in the plaintiff's bank, for which reasons, if for no other, his alleged notice was of no avail.

The defendant in error respectfully submits that a full examination of the evidence introduced, as well as of any offered by the defendants and excluded by the court, and of any admitted by the court which the defendants claim should have been excluded, will disclose that the action of the trial court in directing a verdict for the plaintiff was entirely proper. And such examination will further disclose that if the court had submitted the case to the jury and a verdict had, for any reason, been returned for the defendants, it would have been the duty of the court to promptly set it aside. Hence its action was right and the judgment should be affirmed.

GEO. A. MADILL,
*Of Counsel for Defendant in Error.*



15-0215231
155-231

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# Supreme Court of the United States.

OCTOBER TERM, 1892.

TERM No. 284.

J. LESLIE THOMPSON, AS RECEIVER OF THE FIRST NATIONAL BANK OF SIOUX FALLS, DAKOTA, AND THE FIRST NATIONAL BANK OF SIOUX FALLS, DAKOTA,

*Plaintiffs in Error.*

*v.*

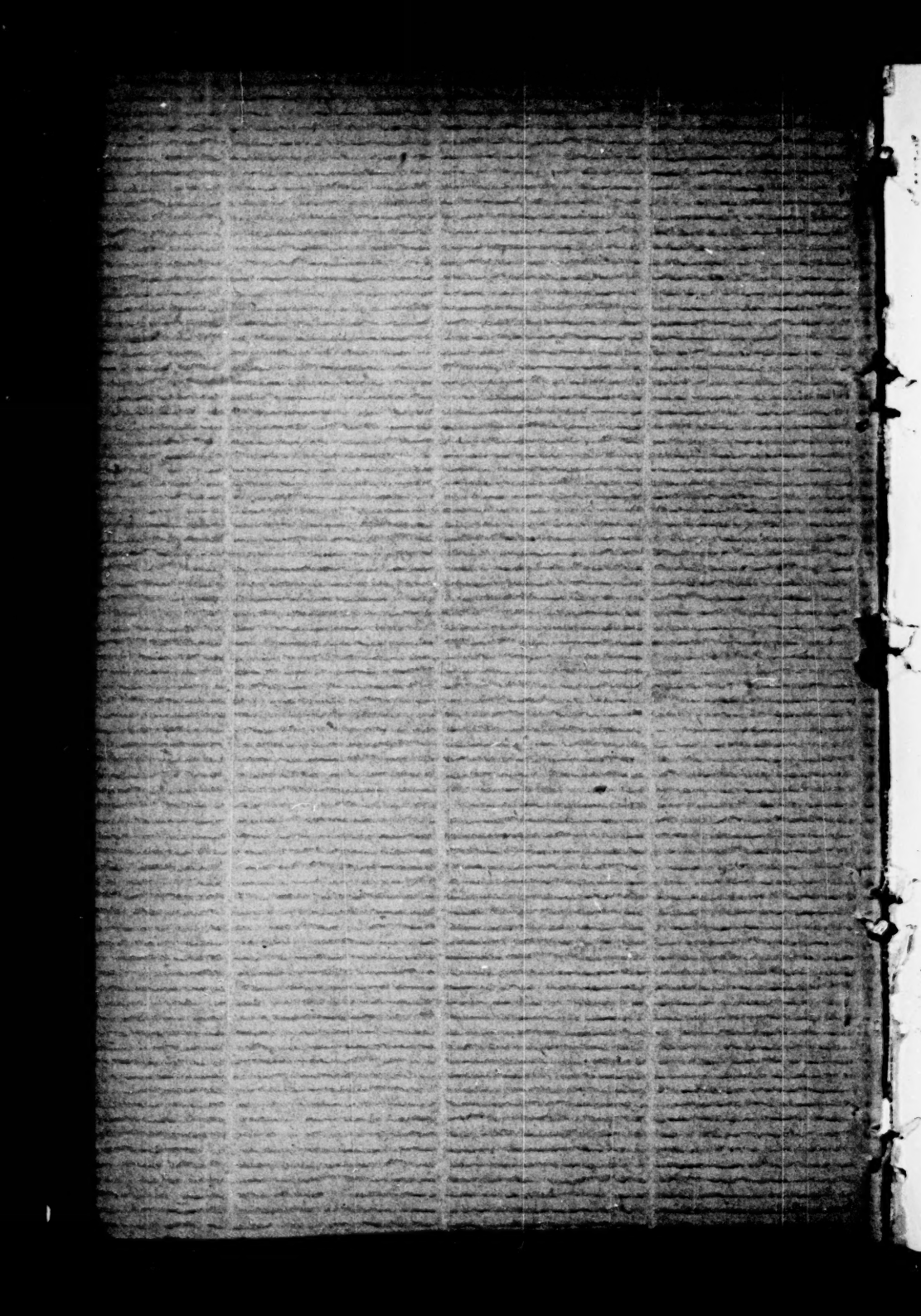
THE SIOUX FALLS NATIONAL BANK OF SIOUX FALLS, DAKOTA.

## In Error to the Supreme Court of the Territory of Dakota.

# BRIEF FOR DEFENDANT IN ERROR.

C. K. DAVIS,
*Counsel for Defendant in Error.*

ST. PAUL, MINN.
DISPATCH PRINTING COMPANY.
1892.



# Supreme Court of the United States.

OCTOBER TERM, 1892.

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J. LESLIE THOMPSON, AS RECEIVER OF THE FIRST NATIONAL BANK OF SIOUX FALLS, DAKOTA, AND THE FIRST NATIONAL BANK OF SIOUX FALLS, DAKOTA,

*Plaintiffs in Error,*

*v.*

THE SIOUX FALLS NATIONAL BANK OF SIOUX FALLS, DAKOTA.

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## STATEMENT.

The defendant in error declared, as endorsee, upon a cashier's check issued by the First National Bank of Sioux Falls, in the following form (p. 31, fol. 51):

"SIOUX FALLS, DAK., Jan'y 12, 1886.

No. 91. The First National Bank of Sioux Falls pay to the order of C. K. Howard, Co. treas., sixteen thousand five hundred seventy one and 61-100 dollars—$16,571.61. (Signed) W. F. FURBECK, C's'r."

Printed across its face were the words "cashier's check."

The bank answered (p. 33, fol. 55), admitting the drawing of the check, and alleged in substance that the check did not come lawfully into the possession of the bank in the usual course of business, and that its acquisition by the bank was *ultra vires*.

It also alleged that the check was never absolutely delivered to the payee so as to become a valid obligation, but was delivered conditionally. That the payee, Howard, as County Tresurer, kept an account with the bank, and that on January 12th, 1886, he applied to it for the sum of $16,571.61. That the credit to his account in bank did not equal the sum requested; that the check was not delivered as an obligation of the bank to Howard, and the transaction was not complete. That Howard took the check into his possession upon the express condition that he would at once make further deposits with the bank, and make his account good for the amount of the check, which was not treated as delivered and operative, and was not to be disposed of by him until the account was made good. That he never made his account good, nor returned the check. That he was, at the time, having his annual settlement as treasurer with the Board of County Commissioners, of Minnehaha county; that he produced said check together with certain moneys before the commissioners in such accounting, and that the commissioners wrongfully took possession of the same from Howard and turned it over to Hollister, Coats and Corson, who illegally received the same and went with it to the Dakota National Bank and offered

it for deposit. That the bank presented the check for payment, payment was refused, and for that reason refused to accept the check upon deposit. That some hours afterwards, one Bailey, and Hollister, Coats and Corson, took the check to the defendant in error, which with full knowledge of the dishonor of the check, took and credited the same to an account in the name of Hollister, Coats and Corson. That the defendant in error paid out no money on account of the check, but gave a pass-book showing a credit for it. The defendant in error at once presented the check for payment, but payment was refused, and notice given to the defendant in error that the check was not a valid obligation; request was made that the same be delivered back to the parties from whom the defendant in error received it, which request was refused.

It is further alleged that the County Commissioners were notified on the 13th day of Jannary, 1886, of these facts, and that neither the County Commissioners nor Hollister, Coats and Corson or Bailey had any property in or right to the possession of the check; that the plaintiff took it in bad faith, with notice of this fact, and of its dishonor, and that it was not a valid obligation and paid nothing for it until after it had full knowledge concerning the check and of the fraud practiced upon the defendant in transferring it.

It is further alleged that Howard was at the time in question the county treasurer of Minnehaha county; that he was in arrears a large amount and without funds to meet his obligations to the county. That he

received the check conditionally, as set forth, and in his official capacity as treasurer.

Repeating the allegations as to the terms upon which Howard received the check, and his default in not returning it or making his account good, the answer proceeds in substance, that Howard presented it to the county board, not then endorsed by him. At that time no settlement was made with him by the board; that before the making of such settlement the bank gave notice to the board of its intention to resist the collection of the check and that it had a good defense thereto, and stated the ground of its defense. That Young, and Hollister, Coats and Corson, were at the time the sureties for Howard upon his official bond as treasurer. That before the presentment of the check to the board and on the same day, Hollister, Coats and Corson had applied to the commissioners to be released from the bond, and the application was refused; that thereafter and on or about January 12th, 1886, and before the issuance of the check, Hollister, Coats and Corson, together with Howard, combined and conspired together with the intention of defrauding the defendant out of the amount of the check, to obtain from the defendant the amount of said check, and that the check was so obtained by Howard in pursuance of said conspiracy.

That the bank was wholly ignorant of such conspiracy and purpose, and relied entirely upon the representations of Howard and his promises then made. That in furtherance of said conspiracy, the sureties and Howard, procured the board of commissioners to aid in carrying it out by unlawfully taking possession of the

check and unlawfully turning the same into the possession of Hollister, Coats and Corson. That at that time the check was endorsed in blank by Howard so as to become negotiable. That the sureties, having the same unlawfully in their possession, further consummated said conspiracy by endeavoring to negotiate the same to an innocent purchaser, but failing to do so, delivered it to the defendant in error and deposited it to their own credit and not to the credit of the county. That the defendant in error had full knowledge of all these facts and with such knowledge unlawfully abetted the consummation of the conspiracy, and presented it on the day it was received from the sureties; and, though then informed by the defendant of all the facts concerning the check, refused to charge it back to said depositors as requested by the defendant, but on the following day commenced action on the check.

Subsequently to this answer the plaintiff in error, Thompson, who had been appointed receiver of the First National Bank of Sioux Falls by the comptroller of the currency, applied to the Court (p. 44, fol. 75) to be substituted as defendant in the place of the bank. Such substitution was denied, but Thompson, as receiver, was made an additional party defendant, by order of the Court, with leave to answer. (P. 46, fol. 80.)

His answer (p. 39, fol. 66) is substantially the same with the answer of the defendant bank.

The new matter in these answers was put in issue by the reply of the bank.

At the time the suit was instituted a writ of attachment was issued under which property, more than suf-

ficient in value to pay the amount of the check, was attached. (P. 20, fol. 32.)

A motion to vacate this attachment was denied (p. 29, fol. 41).

The case was tried before Hon. James Spencer, District Judge, and a jury. The testimony taken is set forth in full in the bill of exceptions (pp. 47 to 155). At the conclusion of the testimony (p. 107, fol. 180), the plaintiff moved the Court to direct a verdict in its favor. The motion was granted, and the jury was directed to return a verdict in favor of the plaintiff, and against the defendants, for the sum of $18,247.14. Judgment was entered dated June 23d, 1887, against the defendants, for that sum and for costs (p. 47, fol. 83). A motion for new trial was overruled (p. 154, fol. 261).

An appeal was taken by the defendants in error from the order which admitted Thompson as an additional defendant. This order was modified in so far as it made the receiver an additional party, and it was ordered and adjudged that Thompson be substituted as defendant in place of the bank, and it was further ordered that the "cause be, and it is hereby, remanded to the District Court for further proceedings according to law, and with instructions to enter judgment in accordance with the judgment of this Court." (P. 158, fol. 268.)

On the appeal from the order refusing to set aside the attachment, the Supreme Court of the Territory of Dakota adjudged that "The order of the said District Court within and for said Moody county appealed from herein be, and the same hereby is, dismissed." (P. 159, fol. 270.)

Upon the appeal from the judgment the following judgment was entered, October 13th, 1888:—(P. 161, fol. 273.)

"The *Sioux Falls National Bank* vs. *First National Bank of Sioux Falls* and *J. Leslie Thompson.*

This action coming on to be heard at the October, A. D. 1888, term of this Court, at the Supreme Court room, in the city of Deadwood, Territory of Dakota,—present, Bartlett Tripp, Chief Justice; and William B. McConnel, Charles M. Thomas, James Spencer, John E. Carland, and Roderick Rose, Associate Justices—and the appeal herein having been argued by F. L. Boyce, Esq., and W. A. Wilkes, Esq., for the appellant; and by H. H. Keith, Esq., and W. R. Steele, Esq., for respondent; and the Court having advised thereon, it is now here considered, ordered and adjudged that the judgment of the said District Court within and for said Moody county, appealed from herein, be, and the same is hereby, in all things affirmed.

"And it is further ordered that this cause be, and it is hereby, remanded to the District Court for further proceedings according to law and the judgment of this Court.

"And it is further considered and adjudged that respondent have and recover of the appellants its costs and disbursements on this appeal expended, taxed and allowed at seventy-nine dollars.

By the Court: BARTLETT TRIPP,
*Chief Justice.*

All concur; Justice Spencer not sitting."

The only opinion delivered by the Supreme Court of the Territory of Dakota appears on page 159, fol. 269, and is as follows: (Pp. 1 and 2).

"The judgment in the principal case is affirmed. The Court holds:

1. The Court erred in denying the motion of the receiver to be substituted as sole defendant in the action.

2. The appeal taken by defendant bank, after appointment of the receiver, from the order refusing to dis-

solve the attachment was unauthorized and must be dismissed.

3. The cashier's check sued upon in this action upon its delivery to Howard, as treasurer, immediately became the property of the county, and the defendant bank could not be heard to assert its want of power to issue the check or the existence of any fact which might be a defense between itself and Howard in his individual capacity; and the plaintiff bank having by the transfer succeeded to all the rights of the county, there was no error in directing the verdict of the jury."

I.

The District Court did not err in directing a verdict and in entering judgment for the plaintiff.

There is no substantial contradiction in the testimony. The substance of it is (p. 47, *et seq.*, bill of exceptions) that on the 12th day of January, 1886, Howard, the County Treasurer, was making his semi-annual settlement with the Board of County Commissioners. At the same time his bondsmen, Corson, Coats and Hollister, were endeavoring to have the board relieve them of their bond, on the ground that their co-surety, Young, had left the Territory and gone to California, and the board for the same reason, was demanding additional surety. Howard had been the treasurer for many years, and had kept his deposits with the First National Bank of Sioux Falls. The bank had repeatedly assisted him in making settlements with the Board of County Commissioners. A few days before this time Howard had made an arrangement with the bank to assist him in this settlement to the amount of about $15,000 (p. 88, fol. 149), and it was arranged between him and the cashier that he should give, and he did give, drafts on Steevers & Co. of Chicago

for the amount, although he had not the proper credit there to obtain the payment of them. The drafts were made, one for $6,000, one for $4,000 and one for $5,000, and they were deposited in the First National Bank to the credit of C. K. Howard, County Treasurer (p. 88, fol. 149).

When the day of settlement came, January 12th, 1886, there was due to the county from Howard as treasurer, $27,236.63 (p. 63, fol. 108; p. 80, fol. 135). To account for this Mr. Howard presented to the commissioners certain sums of money, some drafts, and a bank deposit book, issued to him by the defendant, showing that he had the balance of $15,625.01 on deposit. The board refused to take that in settlement, and told Mr. Howard to go down to the bank and either bring up the money or a certified check (p. 92, fol. 155); he then went to the bank and procured, and exhibited to the board, a letter of which the following is a copy:

"FIRST NAT. BANK, SIOUX FALLS, DAK.
Jan'y 12, 1886.

"The books of the bank show a credit in favor of the county of $15,625.01. If you wish you have the privilege of examining the books. R. J. WELLS, P't.
W. F. FURBECK, Cas."

The board would not make any settlement without money, or a certified check, and insisted upon it (fol. 156). Howard went again to the bank and brought back the check in suit.

On the same or the next day, January 13th, 1886 (p. 93, fol. 158), the check having been endorsed by Howard, was turned over with all the other funds and securities, to the county commissioners, and they turned all of the

same over to the bondsmen, for the reason that "The principal bondsman, J. B. Young, who had justified for $50,000 on the bond, had left the county and gone to California; and that made Mr. Howard, as county treasurer, his bonds of no security, and we required additional bondsmen from Mr. Howard, and while Mr. Howard was furnishing these additional bondsmen the funds were turned over into the hands of the bondsmen of C. K. Howard."

(Testimony of County Commissioner Thompson, p. 91, *et seq.*)

This witness thinks that Howard's bondsmen took charge of the money, drafts and check on the evening of January 12th and the bondsmen were put in charge of the office of the county treasurer.

The following is the record of the county board as to what was done January 12th and January 13th, 1886 (p. 79, fol. 134):

"Record of County Commissioners of Minnehaha county, Dakota.

JANUARY 12th, 1886.

C. K. Howard presented his semi-annual statement, and the settlement with the county treasurer commenced and books—vouchers examined until adjournment. The afternoon was devoted to settlement with county treasurer.

JANUARY 13th, 1886.

On motion of Arthur Jones, the following resolution was adopted: Whereas, in the opinion of the Board of County Commissioners in and for Minnehaha county, D. T., the bond heretofore given by the County Treasurer has been rendered less strong by the removal from the county and territory of one of the sureties (J. B. Young) upon said bond:

Therefore be it resolved, That the County Treasurer of Minnehaha county be, and he is hereby, required by this Board to give additional freehold sureties in the penal sum of $50,000, it being the opinion of the ma-

jority of said Board of Commissioners that the existing security has become insufficient for the proper indemnity of said county.

On motion, the following resolution was adopted:

*Resolved*, That the funds presented to the Board of County Commissioners of Minnehaha county by the treasurer, C. K. Howard, in settlement of his accounts with the county, be, and is hereby, turned over to his bondsmen and the bondsmen are put in charge of the office of county treasurer until the additional bond is furnished, said funds to be deposited and remain the funds of Minnehaha county.

The afternoon was devoted to county-treasurer business."

On the 13th of January the sureties took the funds received by them from the board to the Dakota National Bank, which bank presented the certified check to the First National Bank. Payment was refused. Immediately thereafter they went to the Sioux Falls National Bank, which bank agreed to receive, and did receive, from the sureties all of such funds and securities, including this certified check, on deposit, as cash, and issued to the bondsmen a bank deposit book containing the following entry:

(COVER:)

"Sioux Falls National Bank, Sioux Falls, Dakota, in acc't with H. L. Hollister, C. G. Coats, W. H. Corson, bondsmen.

(FIRST PAGE.)

Sioux Falls National Bank, Sioux Falls, Dakota, in acc't with.....Dr.

Jan'y 13.....$27,236.63

13..... 430.00"

It did not require the bondsmen to endorse the certified check.

Howard resigned January 18th, 1886, and C. L. Norton was appointed his successor. His bonds were ac-

cepted and on January 19th the bondsmen of Howard were directed to turn over to the County Commissioners all the evidences of deposit and all funds belonging to the County of Minnehaha; and, the official oath and bond of Norton having been approved, the check of the bondsmen in the sum of $27,236.63, certified by the president of the defendant in error, was received in full discharge of the bondsmen for the funds received of the County January 13th, 1886, and the funds thus received were turned over to Norton, who receipted for the same to the County Commissioners. (P. 79, fol. 134, *et seq.*)

There is no evidence that sufficiently tends to show that the defendant in error had any notice of any of the facts set up as a defense attending the issue of this check or of its dishonor; nor is there any evidence tending to show that the bondsmen had any notice of the facts set up as a defense and attending the issue of this check; nor is there any evidence tending to show that the County Commissioners had any notice of the facts last named. The testimony of Mr. Wilkes (p. 80, fol. 136,*et seq.*) is wholly insufficient to establish any notice given by him to the commissioners and he does not pretend that he gave any notice whatever to the sureties. The notice that he testifies he gave on January 12th (p. 81, fol. 137) was simply to Mr. Wright, the County Attorney, and Mr. Phillips, the clerk of the Board, and it was that he, Wilkes, understood that there was a check before the Board involving the matter of Howard's settlement, and he wanted them not to take into consideration that check involving so much money; that the bank would defend against it as in the hands of

Howard and refuse payment. He states that on the next day, the 13th, he notified the Board not to make any settlement involving this check as representing the cash it called for, and that was what he was there for. He had no conversation with the Board on the 12th. This was not sufficient notice in itself; besides, it does not appear that he said to the county attorney and clerk or to the commissioners that he appeared on behalf of the bank or notified them by its request. He does not pretend to have given any notification whatever to the sureties. Besides, he is positively contradicted by Commissioner Thompson (p. 93, fol. 157); by Commissioner McKee (p. 96, fol. 162), and he is not corroborated by any testimony given in the case.

II.

The check was made by the bank to Howard for the express and understood purpose of enabling him to make his settlement with the Board of County Commissioners. The testimony to this effect is not contradicted. The witnesses are Furbeck, the cashier (p. 49, fol. 85); Wells, the president (p. 68, fol. 117), and Howard (pp. 82-91, fols. 138-153).

The plaintiffs in error are estopped from setting up any secret understanding as to the check had between Howard and the officers of the bank contrary to the legal effect of the check itself and to the admitted purpose for which it was given.

III.

The check was regular upon its face. It was presented by Howard to the board as it was by the bank intended to be in settlement of his accounts. Howard endorsed it and the board took it in satisfaction. This exonerated the sureties from all liability up to and including that settlement. But Howard's term had not expired; the bond was effectual until such expiration; it had been impaired by the removal of one of the sureties, Young, from the Territory; the board was demanding a surety in his place; the other sureties and Howard were to procure this. But in the meantime, and until this should be done, the board and the sureties were not satisfied that Howard should be entrusted with the funds and perform the duties of County Treasurer. Accordingly, as the law provided might be done, the sureties were temporarily put in control of the office of County Treasurer and received from the board all of the funds, including this check, which Howard had turned over by endorsement to the commissioners.

The board rendered a consideration to Howard and his sureties, by this transaction, in that it satisfied the bond and exonerated all the obligors for any default up to that date.

The sureties rendered a consideration in accepting the duties and obligations of County Treasurer.

All this was done without any notice to the board, as we maintain, or to the sureties, of any of the facts urged as a defense to the check. There certainly was no such notice to the sureties and we maintaid that the testi-

mony of Wilkes on that subject is unsufficient to prove notice to the board, even were it uncontradicted. But it is most decidedly contradicted.

So that the board became the owner of this check for value and without notice. So did the sureties by transfer from the board.

The defendant in error had, in fact, no such notice and likewise became a *bona fide* owner of the check for value.

But, if the facts were as averred in the answer, and were fully and expressly known to the defendant in error when it took the check, its validity in the hands of the bank would not be impaired. Upon familiar principles a holder or purchaser with notice from a holder or grantee without notice, in whom the title or security is valid, takes an unimpeachable title.

IV.

The defendant in error had no right to charge back to the bondsmen the amount of this check after it had been dishonored. It had agreed to take it and had taken it as cash. (P. 99, fol. 167.) The check was not endorsed by the sureties. It bore the sole endorsement of Howard, the payee. So that the bank had no recourse upon the sureties and no right to charge it back.

V.

The cashier had authority to draw the check in suit. Under the evidence the bank was bound by it. He was directed by the president to draw it. (Furbeck, p. 53,

fol. 91; Wells, p. 68, fol. 117; p. 70, fol. 121; Howard, p. 82, fol. 139.) It was, in fact, given for a consideration, viz.: for the three drafts drawn by Howard upon Steevers & Co. of Chicago for $6,000, $4,000 and $5,000 respectively (p. 88, fol. 149).

"3. Where a party deals with a corporation in good faith—the transation is not *ultra vires*—and he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists.

If the contract can be valid under any circumstances, an innocent party in such a case has a right to presume their existence, and the corporation is estopped to deny them.

The jury should have been instructed to apply this rule to the evidence before them.

The principle has become axiomatic in the law of corporations, and by no tribunal has it been applied with more firmness and vigor than by this Court.

Corporations are liable for every wrong of which they are guilty, and in such cases the doctrine of *ultra vires* has no application.

Corporations are liable for the acts of their servants while engaged in the business of their employment in the same manner and to the same extent that individuals are liable under like circumstances.

Estoppel *in pais* presupposes an error or a fault and implies an act in itself invalid. The rule proceeds upon the consideration that the author of the misfortune shall not himself escape the consequence and cast the burden upon another. Smith was the cashier of the State Bank. As such he approached the Merchants Bank. The bank did not approach him. Upon the faith of his acts and declarations it parted with its property. The misfortune occurred through him, and as the case appears in the record upon the plainest principles of justice the loss should fall upon the defendant. The ethics and the law of the case alike require this result.

Those who created the trust, appointed the trustee and clothed him with the powers that enabled him to mislead, if there were any misleading, ought to suffer rather than the other party.

In the Bank of the United States *v.* Davis, Nelson, Chief Justice, said: 'The plaintiffs appointed the director and held him out to their customers and the public as entitled to confidence. They placed him in a position where he has been enabled to commit this fraud.'

The director had fraudulently appropriated the proceeds of a bill discounted for the drawer. It was held the drawer was not liable.

The reasoning of Justice Selden in the Farmers' and Mechanics' Bank of Kent Co. *v.* The Butchers' and Drovers' Bank is also strikingly apposite in the case before us. He said: 'The bank selects its teller and places him in a position of great responsibility. Persons having no voice in his selection are obliged to deal with the bank through him. If, therefore, while acting in the business of the bank and within the scope of his employment, *so far as is known or can be seen by the party dealing with him*, he is guilty of misrepresentation, ought not the bank to be responsible?

* * * * * *

"2. As before remarked, the organic law expressly allowed the bank to buy coin and bullion. We have also adverted to the provisions of the by-laws, that the cashier shall be responsible 'for the moneys, funds, and all other valuables of the bank;' and that 'all contracts, checks, drafts, receipts, etc., shall be signed either by the cashier or president.' The power of the bank to certify checks has also been sufficiently examined. The question we are now considering is the authority of the cashier. It is his duty to receive all the funds which come into the bank, and enter them upon its books. The authority to receive implies and carries with it authority to give certificates of deposit and other proper vouchers. Where the money is in the bank he has the same authority to certify a check to be good, charge the amount to the drawer, appropriate it to the payment of the check and make the proper entry on the books of the bank. This he is authorized to do *virtute officii*. The power is inherent in the office.

The cashier is the executive officer, through whom the whole financial operations of the bank are conducted. He receives and pays out its moneys, collects and pays its debts, and receives and transfers its commercial securities. Tellers and other subordinate officers may be appointed, but they are under his direction, and are, as it were, the arms by which designated portions of his various functions are discharged. A teller may be clothed with the power to certify checks, but this in itself would not affect the right of the cashier to do the same thing. The directors may limit his authority as they deem proper, but this would not affect those to whom the limitation was unknown.

The foundation upon which this liability rests was considered in an earlier part of this opinion. Those dealing with a bank in good faith have a right to presume integrity on the part of its officers, when acting within the apparent sphere of their duties, and the bank is bound accordingly.

In Barnes *v.* The Ontario Bank the cashier had issued a false certificate of deposit. In the Farmers' and Mechanics' Bank *v.* The Butchers' and Drovers' Bank, and in Mead *v.* The Merchants Bank of Albany, the teller had fraudulently certified a check to be good. In each case the bank was held liable to an innocent holder."

Merchants Bank *v.* State Bank, 10 Wall. pp. 644-650.

VI.

The plaintiffs in error assigned in the Supreme Court of the Territory 26 errors (p. 11, fol. 16).

As applicable to each of these assignments we contend that any error, even if committed, was immaterial, did not prejudice the defendants, and could not affect the result upon the uncontradicted and competent testimony introduced.

Cavasos *v.* Trevino, 6 Wall. 773.

Deery *v.* Cray, 5 Wall. 795.

Davis *v.* Fredericks, 105 U. S. 4.

Chicago *v.* Greer, 9 Wall. 726.

Gilme *v.* Higley, 110 U. S. 47.

Union Co. *v.* Taylor, 100 U. S. 37.

Mobile R. R. Co. *v.* Jurey, 111 U. S. 584.

Barth *v.* Clise, 12 Wall. 400.

Grigg *v.* Moss, 14 Wall. 564.

Cannon *v.* Pratt, 99 U. S. 619.

Hornbuckle *v.* Stafford, 111 U. S. 389.

But none of these assignments can be sustained.

It is assigned:

1. The Court erred in refusing to permit the witness Furbeck to answer the question whether it was a common occurrence to find checks of the amount and like the one in suit in the business of Sioux Falls banks.

The objection was properly sustained. The question (p. 51, fol. 88) was leading. Any answer to it would have been immaterial.

2. The Court erred in admitting in evidence, against the objection of defendants, the statement, Exhibit "B," as follows:

FIRST NATIONAL BANK, SIOUX FALLS, DAKOTA.

The books of the bank show a credit in favor of the county of $15,625.01. If you wish, you have the privilege of examining the books. R. J. WELLS, President.
W. F. FURBECK, Cashier.

There is no merit in this assignment. The witness Furbeck (p. 17, fol. 83, *et seq.*) had been examined by the defendants as to a portion of the transactions between Howard and the bank which resulted in giving the check in suit. The answers averred that these transactions were fraudulent. Furbeck had been examined concerning Howard's alleged agreement to return the check or to deposit sufficient to make it good.

The question which elicited the above evidence was asked on cross-examination and was clearly competent on several grounds.

Besides, by reading in evidence a portion of the deposition of the witness Howard the defendants made competent the other portions of that deposition which were read in evidence and which related to the above written statement (fol. 152). The witness McKee was also examined and testified as to this document without objection (p. 96, fol. 161). The defendants thereby waived their exception to the ruling above assigned as error.

3. The Court erred in refusing to permit the witness Furbeck to answer the question whether the check in suit was ever charged up in cashier's check account.

It was clearly immaterial whether the check was or was not charged up in the cashier's check account or charged at all.

4. The Court erred in refusing the offer of the defendants to show by the witness Hollister that the bondsmen of Howard knew that he was behind in his accounts and had been a defaulter for a number of years prior to this settlement; that Hollister, as cashier of the defendant bank, had, at many of the settlements in January and July of each year, taken money or checks to the commissioners when Howard was a defaulter; that he expected the officers of the defendant bank would at this time follow that custom and present a check to the commissioners and that he and the other bondsmen would then step in and ask the commissioners to turn the funds over to them.

This is an offer of immaterial evidence. But the above is not a statement of the entire offer that was in fact made (p. 57–58, fol. 99, *et seq*). The offer that was made was an entirety and several of the facts proposed

to be shown were clearly immaterial. The entire offer was thereby vitiated.

5. The Court erred in refusing the offer of the defendants to show by the same witness that the Dakota National Bank, when the check was offered to it for deposit, refused to receive or give credit or purchase the check without the endorsement or indemnity of the bondsmen, and that an arrangement was then partially entered into for such indemnity and to deposit the funds, and that it was finally arranged that if the plaintiff did not take the check without endorsement the bondsmen would bring it back to the Dakota National Bank.

The next preceding observations apply to this assignment.

6. The Court erred in refusing the defendants' offer to show by the same witness that the president of the plaintiff called for the witness to come down and see him, and in that conversation wanted the witness to help defray the expenses of this suit, and said, "I have helped you out, and you had better help me out."

This offer was properly disallowed. What McKinney is asserted to have said the day after this suit was brought is clearly immaterial.

7. The Court erred in refusing to permit the witness to answer the question, "Did you ever receive a check of $16,000, as a banker, without endorsement by the party presenting it?"

8. The Court erred in refusing to permit the witness Porter P. Peck to answer the following question: "How often, in your experience as a banker in Sioux Falls, have you handled an individual check of the amount of $16,000?"

Any answer to either of these questions would have clearly been immaterial.

9. The Court erred in refusing to permit the witness Corson to answer the following question: "Was anything said at the Dakota National Bank about your giving a bond at the time?" as also the following question:

"Did you know the state of Mr. Howard's account—of his being in default with the county treasury?"

The Court ruled correctly. The questions on their face refer to statements made and knowledge possessed after the sureties had received the securities. They do not purport to refer to any prior time. In any view, however, it was clearly immaterial, as to the plaintiff and all the other parties, what was said about giving a bond, or whether Corson knew the state of Howard's accounts. It is not pretended that the plaintiff ever had any knowledge or notice of these alleged facts. Nor does the question imply, even, who spoke of giving a bond. There is no offer to show that any of the officers of the plaintiff said anything on that subject, nor that any of them knew of the state of Howard's accounts. (Pp. 74-75 fols. 126-127.)

10. The Court erred in overruling each and every of the exceptions taken and filed in writing by defendants to the testimony of the witness Howard.

11. The Court erred in overruling the objection of defendants to the reading of the portions of the deposition of the witness Howard which were *accepted* to by written exceptions on file before passing upon such exceptions.

12. Also in overruling the objection of defendants to the reading of said portions of said deposition without passing upon said written exceptions filed.

13. Also in denying defendants' motion to strike out the testimony of the witness Howard as follows: "I first appeared before the board with the bank book. I afterwards appeared with the letter from the president of the bank, and my recollection is that this last transaction was quite late in the day."

14. Also in overruling defendants' motion to strike out the testimony of the witness Howard concerning Mr. Young and Mr. Hollister and the management of

the First National Bank which existed prior to the time when Wells and Furbeck were in the management.

15. Also in overruling the motion of defendants to strike out the testimony of said witness concerning the Steevers drafts.

16. Also in overruling the defendants' motion to strike out all the testimony of said witness beginning, "A. I had the money in connection with the bank book," and ending, "They said no doubt that all was proper, but they would like to have some little further assurance that I had the stuff—the money."

17. Also in refusing to strike out the words "more conclusive," contained in the testimony of the said witness.

18. Also in refusing to strike out the following question: "Q. Well, what was done by the officers of the bank, Mr. Wells and Mr. Furbeck?" and the answer to said question down to and including the words "bed rock."

19. The Court erred in receiving any testimony of this witness concerning his bank book, the statement to the county board, and the Steevers drafts and Howard's notes.

The Court ruled correctly.

The testimony of Howard was by deposition which had been taken by the plaintiff. The defendants offered in evidence a portion of the cross-examination. To this the plaintiff objected, insisting that if any part were offered the depositions should be offered complete and the whole read; that by using the deposition defendants made Howard their own witness. This objection was not ruled on. The defendants then, without asking for rulings upon certain exceptions to the examination in chief made by them in writing before the trial (p. 85, fol. 144), proceeded to read a portion of Howard's cross-examination. The plaintiff then proposed to read the remainder of the deposition (p. 85, fol. 144). The de-

fendants then objected to reading any portion that they had excepted to before the trial. The plaintiff was permitted to read all of the deposition which the defendant had omitted to read. The foregoing assignments apply to the above situation.

The defendants by reading a portion of their cross-examination, without asking a ruling for their exceptions to the direct testimony, waived them, and made the entire depositions competent. They had filed their exceptions before the trial and could have had them ruled on. They chose not to do so. It was too late to attempt at the trial to avail themselves of their objections, especially after using such selected portions of the document as suited their purpose.

If the exceptions are considered they will be found to be without merit. The deposition is a complete version by Howard of all the *res gestae* concerning his settlement with the board and the check. Before defendants offered to read a portion of it, partial evidence had been introduced by them concerning the above transactions sufficient to entitle the plaintiff to show their entire history.

The bill of exceptions shows on its face that these objections and exceptions are not in fact in the record.

The case was tried before Judge James Spencer. On page 91, fol. 153, the following statement appears in the bill of exceptions subscribed by his initials:

"The grounds of the objections and exceptions in writing to portions of the depositions were not had or fully stated to the Court upon the time (trial?) of the

action and were not denied or ruled upon though they were referred to. J. S."

This statement in the body of the bill of a fact of the character that no rulings were made ought to relieve us from any discussion of the assignments last above set out.

20. The Court erred in permitting the following testimony from the witness Thompson: "Q. What did the bank book show? A. I do know enough about bank books to state what it did show in it. I am not an expert in bank books. The other members of the board examined the bank book. The board refused to take that in settlement, and told Mr. Howard to go down and either bring up the money or a certified check. Q. What did he do? A. He went back to the bank and brought up a letter certified, I think, by both the president and the cashier of the First National Bank."

21. The Court erred in allowing the witness McKee to testify as follows: "I examined the bank book of Mr. Howard. Q. What did the bank book show as the amount of the assets he had at the First National Bank belonging to the county? A. If I remember right it showed a credit of somewhere about $15,000 or $16,000. I examined the book to see. We would not accept the settlement. We would not take the bank book, and told him we had got to have something more definite than the bank book. He then went back down to the bank and brought up a slip of paper (Exhibit 'B' in this case that I have heard read). They passed it over to me, and I examined and read it and passed it over to the district attorney, who said it was only a letter of credit, and told Mr. Howard that we had got to have something more definite than that."

As to evidence of the contents of this bank book Howard testifies (p. 95, fol. 160) as to a thorough and unsuccessful search for it and his belief that it had been burned up with other books and papers about the time he removed from the treasurer's office.

As to the answer to the question "What did he do?" Immediately after the objection to this question and the answer, Exhibit "B" [the letter], was shown this witness and he was asked if it was a copy: he answered that he thought so: the letter was then read to the jury and witness then stated that it was a copy of the letter. To all this the defendants made no objection. Their acquiescence in this proof is emphasized by the fact that to the statement that the letter was a copy the witness added that the board "would not settle without the money, currency or a certified check." This statement defendants moved to strike out, but made no objection to what the witness had said as to Exhibit "B" being a copy or to its being read to the jury. (P. 93, fol. 155–156.)

The answer of the witness McKee as to the contents of the book was competent for the reasons already stated. After answering as to the contents of the bank book he went on to state, not in response to any question, respecting Exhibit "B" and to this part of his statement the defendants made no objection. (P. 95–96, fols. 161–162.)

22. The Court erred in refusing defendants' motion to strike out the testimony of C. E. McKinney that he treated cashier's checks of the defendant bank as cash.

It was not material in what way he treated cashier's checks of the defendant.

23. The Court erred in granting plaintiff's motion to direct a verdict in favor of the plaintiff.

24. The Court erred in directing a verdict in favor of the plaintiff.

25. The Court erred in overruling defendants' motion for a new trial.

26. The Court erred in rendering judgment upon the verdict.

These assignments are too general and do not require discussion.

The judgment should be affirmed.

C. K. DAVIS,

*Counsel for Defendant in Error.*